FILED
031047 JAN 20 2004

No. 03-___

IN THE

Supreme Court of the United States

BRENDA ADAIR AND JOEY ADAIR,
Petitioners,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, and ANN PAYNE, as its Director, RAYMOND A CLENNEY, STEPHEN C. WALKLEY, and JAMES A. LITTLETON,
Respondents.

Petition for a Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's superviosry powers, when said intermediate Court has granted qualified immunity protection to state officials who, acting under state law, have deprived a daughter of rights because of said daughter's relationship with her own natural mother.

2. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has failed to recognize that a significant change in job duties and assignments constitutes an "adverse employment action" cognizable in public employment discrimination and retaliation cases?

3. Whether the Eleventh Circuit's decision conflicts with this Court's decisions in *United States v. Lanier*, 520 U.S. 259 (1997); *Anderson v. Creighton*, 483 U.S. 593 (1972); and *Perry v. Sindermann*, 408 U.S. 593 (1972) on the issue of qualified immunity.

4. Whether the Eleventh Circuit decision is upon an important question of federal law as to the existence of an "adverse employment action" that has not, but should be, settled by this Court, and is departing from its own prior holdings on that issue is *Cox v. American Cast Iron Company*, 784 F. 2d 1546 (11th Cir. 1986); and *Shannon v. BellSouth Telecommunications, Inc.*, 292 F. 3d 712 (11th Cir. 2002).

PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

In compliance with the provisions of Rule 14.1(b), the Petitioner represents to the Court that Rule 29.6 is not applicable to this case because the Defendants are a public agency and public officials of the State of Alabama. Also, all of the parties to the proceeding are named in the caption of the case.

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CITATIONS OF OPINIONS AND ORDERS

The opinions and orders of the United States District Court for the Middle District of Alabama not reported, and are set out at Appendix B (App. 8a) and Appendix C (App. 21a). The orders of that Court denying rehearing are not reported, but are set out at Appendix D (App. 30a) and Appendix E. (App. 31a).

The opinion of the Eleventh Circuit Court of Appeals is reported at 82 F. Appx. 414, ____ F.3d. ___ (Table/2003 WL

22075686, 11th Cir. (Ala.) Aug. 14, 2003 and is set out at Appendix A (App.1a), and the decision of that Court on rehearing is set out at Appendix F (App. 38a).

The Appendix thus includes the following:

A. Decision of the Eleventh Circuit to be reviewed (App. 1a).

B. District Court order of February 11, 2002 (App. 8a).

C. District Court order of April 24, 2002 (App. 21a).

D. District Court order of December 12, 2002 (App. 30a).

E. District Court order December 12, 2002 (App. 31a).

F. Eleventh Circuit order on rehearing (App. 38a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated August 14, 2003, and the decision on rehearing and rehearing en banc is dated October 21, 2003.

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. §1254(1). Rule 10(a) of the Rules of this Court provides for review of a United States Court of Appeals' decision that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rule 10(c) also provides for review in this Court of decisions of the Courts of Appeals that have decided important questions of federal law in a way that conflicts with relevant decisions of this Court.

This case involves questions within those standards through issues as to whether the Court or Appeals has properly applied rules involving the qualified immunity defense of public officials under the decisions in *Saucier v. Katz*, 533 U.S. 194(2001), and *United States v. Lanier*, 520 U.S. 259 (1997), and rules involving what "adverse employment actions" are required in a case of public employment discrimination and retaliation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. §1983 (App. 41a);
42 U.S.C. §2000e(2) (App. 41a);
42 U.S.C. §2000e(3) (App. 41a);
United States Constitution, FIRST AMENDMENT (App. 42a);
United States Constitution, FOURTEENTH AMENDMENT Sec. 1(App. 42a);
Federal Rules of Civil Procedure 8(a) (App. 43a).

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This case was initially filed on November 9, 2000, by Brenda C. Adair and Joey Adair against the Alabama Department of Economic and Community Affairs ("ADECA"), Nick D. Bailey, as acting Director of ADECA, Stephen C. Walkley, Dorothy A. McKinney, Raymond A. Clenney, and James A. Littleton. (R1-1).[1] Brenda Adair sought relief under Title VII of he Civil Rights Act of 1964 for discrimination because of her gender, and she sought relief under Title VII for retaliation against her for having previously accessed Equal Employment Opportunity provi-

[1] Dorothy A. McKinney was ultimately dismissed a party. (R1-29).

sions. Brenda Adair also sought relief under the Equal Pay Act, and for gender discrimination under the Equal Protection Clause of the Constitution. Further, Brenda Adair sought relief under the FIRST AMENDMENT for alleged retaliation against her for exercising her rights to free speech. Joey Adair, Brenda Adair's daughter, sought relief for retaliation by the Defendants against her in failing to re-appoint her to a position for which she had applied in ADECA, because of her kinship with her mother.

The Defendants filed an Answer to the original Complaint (R1-5). The Plaintiff was allowed to file an Amended Complaint on January 19, 2001 (R1-13), adding as a claim for relief by Brenda Adair under the provisions of the Family Medical Leave Act, 29 U.S.C. §2612. (R1-29). The Defendants filed dispositive motions (R1-36) which were initially granted by the Court (R1-40), but some dismissed claims were subsequently reinstated by the trial court. (R1-45; R1-51). The claim of Brenda Adair under the Equal Protection Clause was dismissed as to the Defendants Walkley and Clenney, and the First Amendment expression claim of Brenda Adair was dismissed, and the Family Medical Leave Act claim was dismissed as to all Defendants except ADECA. (R1-51).

On March 29, 2002, Ann Payne, as Director of ADECA, was substituted for Norman B. Davis, Jr., as a party Defendant. (R1-75).

The trial of the case before a struck jury convened on April 8, 2002. At the conclusion of the Plaintiffs' case-in-chief, the Plaintiff Brenda Adair voluntarily moved to dismiss her claims under the Equal Pay Act and the Family Medical Leave Act, and the trial court granted the Defendants' motion for a judgment as a matter of law as to all of Brenda Adair's remaining claims. (R2-86). Joey Adair's claim for injunctive relief went to the jury after the trial court dismissed her claims for damages against the individual Defendants

Walkley and Littleton, and the jury returned a verdict for Joey Adair in responding to a special interrogatory, finding that her relationship with her mother had been a motivating factor in the Defendants' decision not to rehire her. (R2-84).

On May 24, 2002, judgment for the Defendants was entered on all of Brenda Adair's claims, and in favor of Joey Adair for the injunctive relief of reinstatement. (R2-90). A timely motion to alter, amend, or vacate the judgment was filed by the Plaintiffs (R2-99), and that motion was denied by the trial court on September 12, 2002. (R2-103). The Adairs filed their timely notice of appeal on October 9, 2002. (R2-105). A panel of the United States Court of Appeals for the Eleventh Circuit affirmed the trial court's decision on August 14, 2003, and a petition for rehearing and rehearing en banc was denied on October 21, 2003.

II. STATEMENT OF FACTS.

A. Facts Relating to Joey Adair.

As the trial court has correctly noted in its order of June 21, 2002, Joey Adair claimed an invasion of her rights to freedom of association with her mother in that she was not rehired at ADECA by the individual Defendants Walkley and Littleton because of her family relationship to her mother. The trial court dismissed the claim for damages against the individual Defendants on the basis of qualified immunity, and sent the claim to the jury on Joey Adair's claim for injunctive relief only. (R2-100-2 and 3).

The Jury was asked to respond to the following interrogatory:

> Do you find from the evidence that the fact that Joey Adair was the daughter of Brenda Adair was a substantially motivating factor in ADECA's decision not to rehire her?

To that inquiry, the jury responded with a "yes" answer.

B. Facts Relating to Brenda Adair.[2]

Brenda Adair was employed with the State of Alabama for thirty-one years, and with ADECA for thirteen years. On July 27, 2000, she announced her retirement, which became effective August 31, 2000. She began receiving retirement benefits of $36,000.00 per year from the State of Alabama.

Brenda Adair claimed that, for approximately one-and-a-half years preceding her retirement, her work environment was so hostile or abusive that a reasonable person in her circumstances would have found her workplace to be permeated with discriminatory intimidation, ridicule, insult, or threatening, bellicose, demeaning or offensive conduct, that was so "severe or pervasive" as to alter the terms, conditions, or privileges of that person's employment. Second, Plaintiff alleged that her work environment became so intolerable that a reasonable person in her position would have felt compelled to resign, and thus she did not actually retire, but was "constructively discharged." She claims that her harassment was based on her gender. Brenda Adair also claims that adverse employment actions were taken against her in the last year-and-a-half before her retirement in retaliation for her having filed EEOC claims and a lawsuit in 1990. The claims were settled in 1991.

Sometime in 1998, while she was working in the Law Enforcement Traffic Safety ("LETS") Division of ADECA, Brenda Adair was eating lunch with her friend Linda Hart ("Hart"), then Director of the Workforce Development Division ("WDD") of ADECA. She brought up the subject of transferring to the WDD to work with Ms. Hart. Although Brenda Adair knew that Steve Davis, one of the supervisors

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[2] Except or otherwise indicated, the facts herein reported are essentially drawn from those recited by the trial court in its memorandum order of April 24, 2002, supporting its judgment in favor of the Defendants as to all of Brenda Adair's claims.

against whom she had filed claims in 1990, worked in WDD, she still wanted to transfer to that division so that she could work with Hart. That same year, she began to work for Hart in the Welfare-To-Work ("WTW") Department of the WDD, and was classified by the State's merit system as a Planning and Economic Development Level III ("PED-III"). Brenda Adair had one person working under her after she transferred to the WDD, a clerical assistant named Linda Gamble. She was very frustrated working in the WTW program. The program was based on grants, whereby the federal government would match two-to-one every dollar that the State provided to the program. The cause of Plaintiff's frustration was that the state was not providing any money to facilitate the program.

In January, 1999, Stephen Walkley ("Walkley"), classified by the merit system as a Planning and Economic Development Level IV ("PED-IV"), became the acting director of the WDD after a change in state administration. He was officially appointed to the position in October 1999. That same month, the WDD began a reorganization. At this time, the WDD employed approximately fifty-five people and was in the process of changing its main source of federal funds from the Job Training Partnership Act to the Workforce Investment Act ("WIA"). However, the WDD still planned to maintain the WTW program, and still does. When the reorganization began, Walkley sought input from the people who reported directly to him as to the best way to reorganize the WDD. Walkley received a memo from Brenda Adair indicating that she would like to go to one of four places when the reorganization occurred. Walkley placed Plaintiff in the State Planning and Rapid Response Section, one of the four places she had requested. The supervisor of the section was Ray Clenney ("Clenney"), a PED-IV. Brenda Adair was to work with plans regarding the WTW program and issues relating to the WIA, which Walkley considered to be her area of expertise. Shortly after the reorganization, Ms. Adair re-

quested a transfer because her new position required working with Steve Davis, another PED-III, against whom she had brought claims in 1990. However, at that time he had been her supervisor, and after the reorganization he was not, and had not been her supervisor for several years. Ostensibly to ensure that there was no confusion as to who would be supervising this Plaintiff, Walkley sent Brenda Adair a memo, denying her request to transfer, and informing her that 1) Ray Clenney, not Steve Davis, was now her supervisor; 2) Ray Clenney would provide her assignments and review and evaluate her work; 3) Ray Clenney may at times leave Steve Davis as Acting Section Supervisor in his absence, but that Davis would not be reviewing Brenda Adair's work unless she asked him to; and 4) If she felt that she was being subjected to a hostile work environment at any time, she should inform her supervisor immediately. Clenney also left Ms. Adair as acting supervisor at times. Walkley claims that he did not transfer Ms. Adair because he believed that her experience with WTW was valuable to the state planning section and that no transfer was necessary because he thought he had made sure she was not supervised by Steve Davis.

During the reorganization, Linda Gamble was moved from working for Brenda Adair because the planning section to which this Plaintiff moved already had clerical assistance available. This is the loss in supervisory authority in Plaintiff's claim. However, the Plaintiff admits that after the other changes brought by the Defendants in January 1999, there was not as much work to do in the WTW area, and that one person might be able to handle the position. Plaintiff Brenda Adair also claims that Walkley excluded her from supervisory meetings after the 1999 reorganization in retaliation for her 1990 claims against ADECA. *See Maniccia v. Brown*, 171 F. 3d 1364, 1369-70 (11th Cir. 1999). However, the trial court noted that, after the reorganization, Brenda Adair had no supervisory duties, and thus held that there was no reason for her to attend such meetings.

From October 1999 until January 2000, this Plaintiff used her annual leave to undergo sinus surgery. With the exception of a couple of days, she was absent from work for more than two months. She took sick leave from March 13 to March 17, 2000. In mid-May, 2000, Brenda Adair also had surgery on a herniated disc, and was out until July. However, she had problems recovering from the surgery, and needed more time to heal, so she was given donated sick leave by Clenney (her supervisor) and Bill Hornsby (a co-worker). Using the donated sick leave, Plaintiff did not work from July 9 to July 25, 2000. Thus, Plaintiff was again absent from work from approximately May 15, 2000 to July 25, 2000. On July 27, 2000, she filed a notice of retirement.

Brenda Adair's job performance was evaluated annually. Ray Clenney performed her evaluation from February 1, 1999 to February 1, 2000. From 1997 to February 1999, she had received ratings between 38.53 and a perfect 40. Any rating above a 36.7 falls into the "Consistently Exceeds Standards" range. For 1999, Clenney rated Plaintiff's a 28.3, which falls into the "Exceeds Standards" category. Plaintiff was upset, believing that she instead should have received a 38.33, and thus would not sign the performance evaluation sheet. However, Walkley did sign it, and asserted that he thought the score was fair. Clenney had been Brenda Adair's supervisor form October 1999 until February 2000. However, as previously discussed, she had been absent from work for most of the time Clenney had been her supervisor. In addition, this Plaintiff admitted that during 1999, there were no WTW proposals to review, because the program was not being funded at that time. The Plaintiff claims her opportunities for promotion were impeded, but the district court held that the evidence did not support that claim, because Plaintiff did not score high enough on the state-given exam to be promoted from a PED-III to a PED-IV.

This Plaintiff also claimed she was not given proper training for her position. However, the district court discounted this claim by pointing to the evidence that showed that between March and July 2000, the Plaintiff attended at least four training sessions in Atlanta, Georgia, three of which pertained to the WTW program and one of which pertained to the WIA program. The evidence established that Plaintiff was on leave for one week in March 2000; from mid-May until July 2000; and, with the exception of a couple of days, from October 1999 until January 2000. One training session which Plaintiff contends she unsuccessfully sought to attend was a Southeastern Employment Training Association ("SETA") 2000 Spring Conference, which was held March 19-22, 2000, in Asheville, North Carolina. However, Brenda Adair was at the same time attending another training session in Atlanta, Georgia.

The changes effected in Brenda Adairs' employment in and around the time of the reorganization in 1999 were as follows: She was transferred and placed under supervisors that she had previously complained about in a prior lawsuit. (Tr. 208);

1. She asked for a reassignment away form those supervisors (Tr. 208) which request was denied, while other transfer requests were granted. (Tr. 212);

2. Her critical annual performance evaluation was reduced from grades around the 38 level to the 28 level, a significant reduction of over 25%. (Tr. 210; 238);

3. She was not allowed to report to persons making proposals for funding (Tr. 212);

4. She was excluded from meetings on a Welfare-To-Work program, and was not selected to serve on a committee to review Welfare-To-Work proposals. (Tr. 212-213);

5. She was asked by the Defendant Walkley at least five times why she came back to his unit, which implied that the Plaintiff was not wanted there. (Tr. 215);
6. She was severely criticized before a witness by the Defendant Walkley. (Tr. 233);
7. In the reorganization, Brenda Adair was the only person who had her supervisory duties removed. (Tr. 240-241); and
8. She was not given training under the Workforce Development Act, which she understood was to be a part of her job. (Tr. 241).

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals for the Eleventh Circuit had jurisdiction of this cause in the first instance under 42 U.S.C. §1291 because it involved an appeal from a decision of a United States District Court sitting within its Circuit.

ARGUMENT

I. AS TO JOEY ADAIR.

The jury in this case concluded that Joey Adair's kinship with her natural mother was "a substantially motivating factor in ADECA's decision not to rehire her."

The Eleventh Circuit decision held that Plaintiff Joey Adair had failed to overcome the qualified immunity defense and rejected the argument that "the supervisory defendants refusal to rehire Joey Adair because of the litigiousness of her mother so obviously violated the First Amendment on its face that any reasonable state official would have known it at the time." (Memorandum of Opinion 8). That holding is highly suspect. The Court was correct that Plaintiff's counsel had conceded to the district court that there is no materially similar case on point (regarding a mother/daughter case of freedom of association in the employment context), but

counsel did so in his argument to the jury to demonstrate that no specific precedent was needed to notify an official that punishment for family association was prohibited. The Eleventh Circuit has published a rule in another context that "[e]xact correlation is neither likely nor necessary, but the cases must be fair *congeners*. In other words, 'apples should be compared to apples.'" *Silvera v. Orange County School Board*, 244 F. 3d 1253, 1259 (11th Cir. 2001) (quoting from and citing *Jones v. Bessemer Carraway Med. Ctr.* 137 F. 3d 1306, 1311 (11th Cir. 1998). (Emphasis added). The common meaning of the word "congener" is "a person or thing of the same *kind* or *class* as another." *See* Random House Webster's Unabridged Dictionary, 2nd Ed. (1997) (Emphasis added). The First Amendment protections regarding family relationships are so well established as to be beyond question. In *Wilson v. Taylor,* 733 F. 2d 1539, 1544-1544 (11th Cir. 1984), the Court addressed the right of association regarding family members and held that:

> The Fifth Circuit adopted an expansive view of an individual's first amendment right of association in *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir.1980). . . . Under *Sawyer,* the first amendment right to associate is not limited merely to those instances where two or more individuals meet to advance shared beliefs. *Sawyer* teaches that one's first amendment right to associate encompasses the right to simply meet with others. If, indeed, the right of freedom of association applies to individuals meeting on the public streets, it must also apply to a man and a woman who are dating.
>
> . . . As with the *Sawyer* court, the court in *McKenna v. Peekskill Housing Authority*, 497 F.Supp. 1217 (S.D.N.Y. 1980), modified, 647 F.2d 332 (1981), held that freedom of association is not limited merely to those situations where an advancing of common beliefs occurs.

> More recent cases have properly recognized that the First Amendment also applies to social and personal associations, including those which do not purport to express and advocate ideas. For example, in *Tyson v. New York City Hous. Auth.*, 369 F.Supp. 513 (S.D.N.Y. 1974), Judge Metzner held that public housing tenants had a cause of action under the right of association when they were threatened with eviction because of acts committed by adult children who did not live with them. As Judge Metzner explained: The nub of this claim is that by declaring these tenants ineligible for continued occupancy on the basis of their children's acts, the defendants have acted "solely from the fact of association" by the plaintiffs with their children. . . . Such a claim, if proven, would run afoul of the First Amendment which guarantees to every person the right to freely associate with others, including members of his family. *Id.* at 520.
>
> *McKenna,* 497 F.Supp. at 1221. The relevant question is not whether individuals wish to advance common beliefs, but whether they wish to associate with others.

The Defendants, in denying Joey Adair's constitutional rights, knew or should have known that they were violating Ms. Adair's First Amendment protections regarding her freedom of association with a member of her family.

The only issue on this appeal that involves Joey Adair is whether the trial court properly dismissed the Defendant Walkley and Littleton based upon their qualified immunity defenses. The fact that the Defendants were motivated by a desire to reject Joey Adair's application for rehire because of her relationship with her mother, Brenda Adair, has been established by the jury. This Court has also long since condemned actions such as those here involved. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court said:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable

> governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech *or associations*, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 US 513, 526, 2 L Ed 2d 1460, 1473, 78 S Ct 1332. Such interference with constitutional rights is impermissible."

(Emphasis added). [3]

The doctrine of qualified immunity protects public officials from monetary damages liability when their conduct does not violate "clearly established" law. There are two steps to analyzing a qualified immunity issue. First, the Court must determine if the government official's conduct violated a constitutional right. If a violation of constitutional right occurred, the Court then must determine whether the right was clearly established. A right is clearly established if it is clear to a reasonable government official that his or her conduct was unlawful in light of the circumstances. 42 U.S.C. §1983; *Saucier v. Katz*, 533 U.S. 194 (2001).

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[3] As previously pointed out, the courts have strongly held that freedom of association is no longer tied only to the advancing of political beliefs. *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970). An even broader view was adopted in *Sawyer v. Sandstrom*, 615 F. 2d 311 (5th Cir. 1980). Under *Sawyer*, the first amendment right to associate is not limited merely to those instances where two or more individuals meet to advance shared beliefs. *Sawyer* expands one's first amendment right to associate to simply meet with others. *Mckenna v. Peekskill Housing Authority*, 497 F. Supp. 1217 (S.D.N.Y. 1980) held that freedom of association is not limited to situations where an advancing of common beliefs occurs.

One way to show that a law is "clearly established," or that the official had fair warning, is to point to a prior similar case, but that is not the only way. In *United States v. Lanier*, 520 U.S. 259, 270 (1997), this Court rejected the "fundamentally similar" requirements and warned against requiring too "extreme a level of factual specificity" in determining the issue of qualified immunity. "General statements of law are not inherently incapable of giving fair and clear warning." See *Lanier*, 520 U.S. at 268.

An Eleventh Circuit case already cited which comes very close to the instant case is *Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984). Wilson was employed by the Winter Park, Florida Police Department. During his first year on the job, he began dating Susan Blackburn, the adopted daughter of Harlan Blackburn, a convicted felon reputed to be a key figure in organized crime in central Florida.

The Court in *Wilson* stated in its opinion that "we follow *Sawyer* and align ourselves with recent cases holding that the first amendment freedom of association applies not only to situations where an advancing of common beliefs occurs, but also to purely social and personal associations. Using the rationale in *Sawyer*, *Bruns*, and *McKenna*, we conclude that the relationship between Wilson and Susan Blackburn was protected under the first amendment freedom of association." 733 F. 2d, at 1544. The *Wilson* Court further concluded that a "state violates the fourteenth amendment when it seeks to interfere with the social relationship of two or more people. . . ." (*Id.*).

Chesser v. Sparks, 248 F.3d 1117 (11th Cir. 2001), involved an employee who was terminated from her county clerk position and who subsequently brought a § 1983 action against the county commissioner alleging violation of her first amendment rights of free speech and freedom of association. Sparks was the only commissioner and Chesser was employed in the clerk's office. Part of her responsibilities

included the preparation of the payroll for several departments, including the sheriff's office. Chesser's then husband was the sheriff, who was a political enemy of Sparks.

Sparks issued a memorandum to all county departments stating that overtime would not be reimbursed in the form of wages. Nonetheless, the sheriff's department was issued overtime in the form of wages. Chesser was terminated for insubordination and for demonstrating a lack of cooperation and she filed suit. Qualified immunity was raised as the defense to Chesser's claims in a motion to dismiss. The Court of Appeals in *Chesser* analyzed the case in the light of the balancing test in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1983).

The instant case is distinguishable from *Chesser* for both Joey and Brenda Adair, since there was no evidence that their conduct was disruptive. There was no testimony suggesting that either had been insubordinate or uncooperative. Testimony was to the contrary, that Brenda Adair was very enthusiastic, competent, and worked hard. Of course, as to Joey, she was denied a rehire for no reasons other than she was the daughter of Brenda. Her lack of competence or cooperation never entered the picture.

Chesser cites *Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984) and notes that *Wilson* did not address the *Pickering* balancing test, because disruptive behavior was not involved in *Wilson*. The Defendants were surely placed on notice or given fair warning that the state could not terminate an individual because of his or her personal relationships and that to do so was a violation of that individual's First Amendment rights. First Amendment law is so basic and fundamental to our democratic society, that it would be unthinkable that the Defendants were unaware of the law relating to those rights.

The Plaintiff Joey Adair submits that her case is sufficiently similar to the *Wilson* case, and that the Defendants were provided with a fair warning to know that their actions violated clearly established law. Therefore, the doctrine of qualified immunity would not apply to the instant case and Plaintiff Joey Adair is due an award of damages.

In *McCabe v. Sharrett*, 12 F. 3d 1558, 1563 (11th Cir. 1994), McCabe was transferred and demoted because of her marriage to Joe McCabe, a police officer under Chief Sharrett. The district court concluded that McCabe's transfer constituted an adverse employment action and that her transfer was solely because of her marriage relationship. However, the *McCabe* Court also further concluded that the transfer was justified by applying the balancing test in *Pickering*, as to whether the exercise of the constitutional right outweighed the government's interest in "promoting the efficiency of the public services it performs through its employees." *Pickering* at 568. The district court concluded that in light of a police chief's need for effective management of the police department, which requires tight control over sensitive information, the government's need for confidentiality outweighed McCabe's right to be married. This Court agreed and affirmed the district court's decision. Unlike *McCabe*, there was no confidentiality issue raised regarding Joey Adair's position in this case.

There has not been a prior case in the Eleventh Circuit with exactly the same set of freedom of association facts as the instant case. However, this Court has said, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful, . . . but it is to say that in the light of pre-existing law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Joey Adair submits that in the light of

pre-existing law, the Defendants knew or should have known that it was unlawful to refuse to rehire Joey Adair because she was daughter of Brenda Adair.

II. AS TO BRENDA ADAIR'S CLAIMS.

At the trial of the case before a jury, the trial judge granted a motion for judgment as a matter of law to the Defendants as to Brenda Adair's claims of Title VII discrimination and retaliation, essentially based only upon the court's conclusion that none of the actions taken against Ms. Adair's rose to the level of adverse job actions. That decision needs to be reviewed very carefully by the Court in view of clearly binding precedent on the subject of adverse job actions.

The first real time the Eleventh Circuit addressed a similar case involving adverse employment actions was in *Cox v. American Cast Iron Pipe Company*, 784 F. 2d 1546 (11th Cir. 1986). There, the panel faithfully followed its duty under *Bonner v. City of Prichard*, 661 F. 2d 1206 (1981) (*en banc*), to be bound by prior Former Fifth Circuit decision, and stated:

> Several further errors appear in the judgments against individual plaintiffs. First, the district court erred in its determination that the injury appellant Mary Jane Seabury suffered from a brief denial of a transfer to the plant was *de minimis*. We cannot accept this characterization. *Title VII gives us no license to decide that any injury, however insignificant, may be regarded as de minimis*. As appellant argues, "[w]hat is small in principal is often large in principle." *Jenkins v. Untied Gas Corp.*, 400 F. 2d 28, 32-33 (5th Cir. 1968).
>
> Second, the district court improperly rejected the claim of appellant Bernice Huffman that she was "demoted" to an inferior job title and duties (although with the same salary) because she was female. The court was mistaken in assuming that this claim was not cognizable under Title VII. The former Fifth Circuit held in *Swint v.*

> *Pullman Standard*, 539 F. 2d 77, 89 (5th Cir. 1976), that "a Title VII plaintiff does not have to show economic loss to prove discrimination." *Job titles and duties themselves are conditions of employment protected by Title VII.*

784 F. 2d 1561. (Emphasis added).

The holding in *Cox* is very concise and easy to comprehend, and a panel of the Eleventh Circuit Court is required to follow it. In *Wilson v. Taylor*, 658 F. 2d 1021, 1034 (5th Cir., Unit B, 1981), the Court said:

> It is the firm rule of this circuit that we cannot disregard the precedent set by a prior panel, even though we perceive error in the precedent. Absent an intervening Supreme Court decision which changes the law, only the *en banc* court can make the change. *Hernandez v. City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981); *Fulford v. Klein*, 529 f. 2d 377 (5th Cir. 1976), *majority opinion adopted by en banc court*, 550 F. 2d 342 (5th Cir. 1977); *Davis v. Estelle*, 529 F. 2d 437 (5th Cir. 1976).

(Emphasis added).

Therefore, under the clear controlling precedent in the Eleventh Circuit, panel decisions rendered after the panel decision in *Cox* cannot be followed unless it takes the *Cox* rationale into consideration. The several alterations in the treatment of Brenda Adair clearly fall within the parameters of the decision in *Cox*. For example, a 25% decline in the numerical score on her performance evaluation, considered to be *de minimis* by the trial court, had a potentially devastating effect on her employment and enforces the *Cox* deferral to a Former Fifth Circuit doctrine that "what is small in principal is often large in principle." Ala. Code 1975, § 36-26-22. Performance evaluation scores are to be considered in all cases of salary increases or decreases, promotions, demotions, transfers, dismissals, re-employments, and lay-offs. (*Id.*)

In rejecting Brenda Adair's Title VII claims, the trial court also, as a practical matter, rejected her claim of gender discrimination under the Equal Protection Clause of the Fourteenth Amendment. That claim (R1-51-7), though different from claims under Title VII, is measured by some of the same standards. See *Bass v. Board of County Commissioners*, 256 F. 3d 1095 (11th Cir. 2001). It is enforced through 42 U.S.C. § 1983 which, unlike Title VII claims, is not brought against a state agency, but is pursued against officials acting in their official capacities for prospective injunctive relief, and against officials in their individual capacities for monetary damages. *Kentucky v. Graham*, 473 U.S. 159 (1985).

The rejection of Brenda Adair's claims also swept with it her claim of deprivation of her rights to freedom of expression and freedom of association under the First Amendment. Those claims (R1-51-13) were based upon Ms. Adair's perceived affiliation with the administration of Governor Fob James, and upon her participation in EEO proceedings, and for "having voiced allegations about the misuse of federal funds." (R1-13-4). These claims, insofar as they sought prospective injunctive relief, should not have been dismissed because of the clear proscription in the case of *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), discussed *infra* in this brief.

The trial court has noted that the claims for damages against the individual Defendants Walkley and Clenney under the claims of equal protection and freedom of expression and association are subject to the defense of qualified immunity. (R1-51-5). That conclusion, especially in view of the historical holding in *Perry*, and the admonition against a demand for too much specificity in *United States v. Lanier*, 520 U.S. 259, 268, 270 (1997), justifies closer scrutiny.[4]

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[4] To the extent that they are applicable, the Appellants suggest

The panel decision held that Brenda Adair has failed to show that she suffered from an objectively adverse employment action. The panel held that to prove an adverse employment action under Title VII, an employee must show a serious and material change in the terms, conditions or privileges of her employment. *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238-39 (11th Cir.2001). The panel further held that the change is to be judged by an objective standard. *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1448-49 (11th Cir.1998).

The panel went on to hold that the "most serious change in the conditions of employment alleged by Brenda Adair is that her evaluations declined from 'consistently exceeds standards' to 'exceeds standards'." Section 36-26-22(a) of the *Code of Alabama*, 1975, addresses performance evaluations and their effect on the employee:

> (a) In cooperation with appointing authorities, the director shall establish and may from time to time amend standards of performance and output for employees in each class of positions in the classified service or for groups of classes and a system of service ratings based upon such standards. In such manner and with such weight as shall be provided in the rules, *service ratings shall be considered in determining salary increases and decreases within the limits established by law and by the pay plan, as a factor in promotion tests, as a factor in determining the order of lay-off when forces must be reduced because of lack of funds or work and the order in which names are to be placed on reemployment lists and as a means of discovering employees who should be promoted, demoted, transferred or dismissed.*

(Emphasis added).

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that what has hereinbefore been said about qualified immunity as to Joey Adair's claim should be considered in addressing Brenda Adair's claim, also.

In *Shannon v. BellSouth Telecommunications, Inc.*, 292 F.3d 712, 716 (11th Cir. 2002), the Court held, when considering adverse employment actions, that the action does not have to rise to the level of the "ultimate employment decision" and that "conduct falling short of an ultimate employment decision may still be cognizable under Title VII, if it reaches 'some threshold level of substantiality.'" The court further held that:

> While the other actions of which Shannon complains "might not have individually risen to the level of adverse employment action under Title VII, when those actions are considered collectively, the total weight of them does constitute an adverse employment action." *Id.*

Also, the court held that there must be a causal connection, and that:

> To establish a causal connection, a plaintiff must show that the decisionmakers were aware of the protected conduct, and that the protected activity and the adverse actions were not wholly unrelated." . . . "Close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated."

The panel correctly noted that the Plaintiff relies on the case of *Cox v. American Cast Iron Pipe Company,* 784 F. 2d 1546 (11th Cir. 1986), for the proposition that the Court is bound by precedent of a prior panel decision. *Cox* clearly mandated that the lower courts *are* (emphasis added) to recognize that "job titles and duties themselves are conditions of employment protected by Title VII.", and *Cox*, in quoting *Swint v. Pullman-Standard*, 539 F.2d 77, 89 (5th Cir. 1996) stated that "'a Title VII plaintiff does not have to show economic loss to prove discrimination.'" (Appellant's Brief 16). When the *Cox* case was decided in 1986, it became binding precedent in the 11th Circuit, and was required to be followed by all panels in subsequent cases, absent an

intervening *en banc* or Supreme Court decision. *See Wilson v. Taylor*, 658 F.2d 1021, 1034-35 (11th Cir. 1981). Since the *Cox* case is the clear controlling precedent in the Eleventh Circuit, decisions of the lower courts and panel decisions rendered after the panel decision in *Cox* cannot be followed unless they take the *Cox* rationale into consideration.

The Eleventh Circuit panel has held that the *Cox* case is not applicable to this appeal because it was a pattern and practice discrimination case where the "pattern and practice of discrimination had already been shown" and that the language of the *Cox* case "refers to an entirely distinct legal issue for the minimum showing a plaintiff must make to prevail on a retaliation claim under Title VII." (Memorandum of Opinion p.6). With all due respect to the panel's observation, the *Cox* case was clearly describing the kind of employment decisions that were impermissible and actionable under Title VII, and to conclude otherwise distorts the language there used.

In footnote 2 of the Eleventh Circuit Court's Memorandum of Opinion on page 6, the Court held that "a 'heightened' pleading requirement for litigants" must be adhered to if a plaintiff is to "overcome a qualified immunity defense." However, in *Marsh v. Butler County, Alabama*, 225 F.3d 1243, 1245 (11th Cir. 2000), that Court held:

> The dismissal of a complaint for failure to state a claim is reviewed de novo. *In re Johannessen*, 76 F.3d 347, 349 (11th Cir.1996). In conducting such a review, appellate courts must keep in mind that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236-37, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In interpreting Federal Rule of Civil Procedure 8, which governs the filing of complaints, the Supreme Court has held that a plaintiff need only set out "'a short and plain statement of the claim' that will give the defendant fair notice of

what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). That requirement is no different in cases brought under Section 1983. Indeed, the Court has explicitly held that courts may not apply a "heightened pleading standard" over and above the dictates of Federal Rule of Civil Procedure 8(a) to claims under Section 1983.[5] *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant this petition and issue it a Writ of Certiorari to the United States Court of Appeals requiring it to review its decision, reverse the judgments of the district court, and remand the case to that court for further proceedings.

Respectfully submitted,

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[5] Federal Rule of Civil Procedure 8(a) states:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 14, 2003]

No. 02-15750
Non-Argument Calendar

D. C. Docket No. 00-01562-CV-D-N

BRENDA ADAIR, JOEY ADAIR,
Plaintiffs-Appellants,

versus

ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, STEPHEN C. WALKLEY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before TJOFLAT, BIRCH, and MARCUS, *Circuit Judges*.

PER CURIAM:

Appellants Brenda and Joey Adair appeal from several rulings by the district court in favor of appellees, Alabama Department of Economic and Community Affairs ("ADECA"), Ann Payne as Director of ADECA, and Stephen Walkley, Raymond Clenney, and James Littleton in their individual capacities. Brenda Adair appeals from the district court's order dismissing her claims against the individual defendants, brought pursuant to 42 U.S.C. § 1983, on the basis of qualified immunity. She also appeals from the district court's order granting judgment as a matter of law to the appellees with respect to her claims brought pursuant to Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Joey Adair appeals from the district court's dismissal of her § 1983 claims against Walkley and Littleton on the basis of qualified immunity.

"We review *de novo* a district court's entry of judgment on the pleadings, accepting the facts in the complaint as true and viewing them in the light most favorable to the nonmoving party." *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). We also review the district court's grant of judgment as a matter of law de *novo,* employing the same standard as the district court used and viewing all the evidence in the light most favorable to the nonmoving party. *See Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1313 (11th Cir. 1998).

Upon thorough review of the record as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The facts of this case are straightforward. Brenda Adair, an employee of ADECA, filed an EEOC charge and lawsuit against her employer in 1990, which she then settled in 1991. In 1998, Adair successfully requested a transfer to the Welfare-To-Work ("WTW") department of ADECA's Work-force Development Division ("WDW"). Unfortunately, Adair soon became frustrated with the WTW department because the State of Alabama was not funding the program.

Shortly thereafter, Stephen Walkley became the director of the WDW and began to reorganize the department. He assigned Brenda Adair to the State Planning and Rapid Response Section, one of the sections she had requested, where her new supervisor was Ray Clenney. Soon after the reorganization, Adair requested another transfer because she realized that she was now forced to work with Steve Davis, one of the people against whom she had filed claims in 1990. To defuse any conflict, Director Walkley sent Adair a memo clarifying that Davis was not her supervisor and she would

never have to work under him. Walkley told her that she should notify her actual supervisor, Clenney, if at any time she thought she was being subjected to a hostile work environment.

Beginning in October of 1999, Adair spent most of her time out of the office on sick leave for sinus surgery and herniated disc surgery. On July 27, 2000, she filed a notice of retirement. Soon after retiring, she filed a new EEOC charge. Adair claims that after the reorganization, her performance reviews dropped from 38.53 and higher ("Consistently Exceeds Standards") to 28.3 ("Exceeds Standards"). She also claims that she was denied training, was criticized verbally, and no longer had an employee working under her as before.

Meanwhile, Brenda's daughter Joey Adair, who had previously worked at ADECA, had taken a temporary leave of absence and now wished to return to ADECA. However, when she applied for re-employment, she was denied because of ADECA's problems with her mother. Brenda and Joey Adair then filed suit in federal district court on November 9, 2000, alleging seven separate claims against ADECA and the individual defendants.[1]

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[1] More specifically, the Adairs brought the following claims (all of which were brought by Brenda Adair except for claim 6, which was brought by Joey Adair): 1) a sex discrimination claim against ADECA pursuant to Title VII; (2) a retaliation claim against ADECA pursuant to Title VII; (3) a gender discrimination claim against ADECA, pursuant to the Equal Pay Act, 29 U.S.C. § 206(d)(1); (4) a claim for injunctive relief against the director of ADECA and for damages against Walkley and Littleton in their individual capacities, for violating her rights under the Equal Protection Clause; (5) a First Amendment retaliation claim against Walkley and Clenney in their individual capacities and for injunctive relief against the director of ADECA; (6) a First Amendment retaliation claim by Joey Adair for damages against Walkley and Littleton in their individual capacities and for injunctive relief against the director of ADECA; and (7) a retaliation claim for injunctive relief against ADECA under the Family Medical Leave Act, 29 U.S.C. § 2617. (During trial,

The district court dismissed Brenda Adair's suit against the individual defendants, finding that they were entitled to qualified immunity. Then, after a three day jury trial, the district court granted judgment as a matter of law in favor of ADECA on Adair's Title VII hostile work environment, constructive discharge, and retaliation claims. In a special interrogatory, the jury returned a verdict in favor of Joey Adair on her remaining claim for injunctive relief against ADECA for its refusal to re-employ her. (The district court had previously granted qualified immunity to Walkley and Littleton on Adair's § 1983 claim). Following the district court's rulings, the Adairs appealed.

Brenda Adair argues on appeal that the district court erroneously held that none of ADECA's decisions constituted "adverse job actions." To prove an adverse employment action under Title VII, an employee must show a serious and material change in the terms, conditions, or privileges of her employment. *See Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238-39 (11th Cir. 2001). Furthermore, the change is to be judged by an objective standard. *See Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441,1448-49 (11th Cir. 1998). Here, where the most serious change in the conditions of employment alleged by Brenda Adair is that her evaluations declined from "consistently exceeds standards" to "exceeds standards," we agree with the district court that she has failed to show that she suffered from an objectively adverse employment action.

Adair's sole response in her brief is that although the last fifteen years of our jurisprudence may indicate that she has failed to show an adverse employment action, we are actually

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Brenda Adair withdrew her claims under the Equal Pay Act and Family Medical Leave Act. In addition, Dorothy McKinney was a defendant in the original complaint but was removed from the case at an early stage in the proceedings).

bound by a prior panel decision in *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), in which we held that "Title VII gives us no license to decide that any injury, however insignificant, may be regarded as *de minimis.*" *Id.* at 1561. However, Cox was a disparate treatment case in which a pattern and practice of discrimination had already been shown. The language quoted refers to an entirely distinct legal issue from the minimum showing a plaintiff must make to prevail on a retaliation claim under Title VII. *See Davis*, 245 F.3d at 1239. Therefore, Adair is incorrect that the legal issue in this case has already been decided by Cox.[2]

Joey Adair appeals the district court's grant of qualified immunity to Walkley and Littleton. We use a two part test to determine whether state officials are entitled to qualified immunity. First, we determine whether the plaintiff's allegations, if true, establish a constitutional violation. *See Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 2513, 153 L. Ed. 2d 666 (2002). Second, if the plaintiff's version of the facts establish a constitutional violation, we determine

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[2] In her brief, Adair also devotes two paragraphs to the district court's dismissal of her First Amendment claim. She argues that her claim was valid under the Supreme Court's ruling in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), which held that a state cannot refuse employment on the basis of an applicant's constitutionally protected free speech. *Id. at* 597, 92 S. Ct. at 2699. However, the district court dismissed Adair's claim because it found that her isolated and vague allegations about "having voiced allegations about the misuse of federal funds" "having filed [an] EEOC charge" and made "other protected utterances" were plainly insufficient to support a claim that the individual defendants knowingly retaliated against her for her protected exercise of public speech. We agree. *Perry* provides a legal framework for a First Amendment violation claim, but Adair must first plead a concrete set of facts to support it. *See generally GJR Inves. v. County of Escambia,132* F.3d 1359,1367-68 (11th Cir.1998) (establishing a "heightened" pleading requirement for litigants attempting to overcome a qualified immunity defense).

whether the law was clearly established at the time. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

We therefore begin by determining whether the refusal to hire Joey Adair because of her relationship to her mother, if true, violates Joey Adair's constitutional rights. The Supreme Court has repeatedly held that a state may not deny employment to a person on a basis that infringes on her constitutionally protected interests, particularly freedom of association. *See, e.g., Perry,* 408 U.S. at 597, 92 S. Ct. at 2697. We have noted that "[t]he courts have strongly held that freedom of association is no longer tied merely to an advancing of political beliefs." *Wilson v. Taylor*, 733 F.2d 1539, 1543 (11th Cir. 1984).

In *Wilson*, a police officer had been terminated from the Winter Park, Florida police department for dating the daughter of an organized crime figure in Winter Park. We found that "[t]he concept of freedom of association has grown to include more than associations which are for the purpose of advancing shared beliefs." *Id.* As such, the relationship between the police officer and the crime figure's daughter was protected by the First Amendment, whose protections, we held, extended to "purely social and personal associations." *Id.* at 1544.

Assuming that the relationship between Brenda and Joey Adair is equally worthy of protection, and even accepting for the purposes of this case that Joey Adair has therefore proven a constitutional violation, we nevertheless conclude that Adair plainly fails the second prong of qualified immunity analysis—showing that the right was clearly established. In making this determination, we look to whether state officials were given "fair warning" that their conduct was unconstitutional. See *Hope*, 536 U.S. at 739-40, 122 S. Ct. at 2515. We have held that a state official will be found to have had fair warning under two circumstances: (1) where a materially

similar case has already determined that the conduct was illegal; or (2) where the conduct was so egregious that any reasonable state official must have known it was unconstitutional. *See Lee v. Ferraro*, 284 F.3d 1188, 1198-99 (11th Cir. 2002); *Rowe v. City of Ft. Lauderdale*, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002). Adair's counsel conceded to the district court that there is no materially similar case on point. Furthermore, we do not think that the supervisory defendants' refusal to rehire Joey Adair because of the litigiousness of her mother so obviously violated the First Amendment on its face that any reasonable state official would have known it at the time. Accordingly, we affirm the district court's grant of qualified immunity to Walkley and Littleton with respect to Joey Adair's First Amendment claims.

AFFIRMED.[3]

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[3] Appellant's motion to stay the decision on appeal pending a decision in *Bylsma, et al., v. Walkley, et al.*, 01-16102, is DENIED as moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Feb. 11, 2002]

CIVIL ACTION 00-D-1562-N

BRENDA C. ADAIR, *et al.*,
Plaintiffs,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, *et al.*,
Defendants.

ORDER

Before the court is a Motion For Partial Judgment ("Mot.") filed by Defendants on November 30, 2001. (Doc. No. 36.) As Plaintiffs did not respond to said Motion within the time period proscribed by the court, the Motion was granted on January 10, 2002. (Doc. No. 40.) Plaintiffs have since cited extenuating circumstances and asked the court to reconsider its Order. (Doc. No. 43.) The court agreed to hear arguments as to the propriety of reconsideration (Doc. No. 45), and all parties have submitted pleadings on the issue. (Doc. Nos. 47, 50.) After careful consideration of the arguments of counsel, the relevant law, and the record as a whole, the court finds that its previous Order is due to be vacated, and that Defendants' Motion is due to be granted in part and denied in part.

I. DISCUSSION

The cause of action arises out of numerous incidents alleged to have occurred during the final ten years of Plaintiff Brenda Adair's employment with the Alabama Department of Economic and Community Affairs ("ADECA"). She and her daughter have filed seven claims against ADECA and a number of its officials. Defendants have moved for a partial judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. "Judgment on the pleadings is appropriate when there are no material facts in dispute." *Hawthorne v. Mac Adjustment Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). As such, the facts alleged in the complaint are accepted as true and are construed in the light most favorable to Plaintiffs. *Id.* Indeed, judgment will be granted only when it appears "beyond doubt" that Plaintiffs can prove no set of facts entitling them to the relief sought. *Id.* (internal citations omitted).

The facts construed most favorably to Plaintiffs are as follows. Brenda Adair alleges that ADECA officials and employees harassed her due to her gender, as well as because of certain activities in which she engaged. (Am. Compl. ¶¶ 10-17.) Said activities include (1) an EEOC charge she filed in 1990, (2) the ensuant lawsuit which was eventually settled, (3) her election of FMLA leave in 1999 and 2000, and (4) her "having voiced allegations about the misuse of federal funds provided to ADECA." (*Id.* at 10-11.) She also suggests that she was mistreated due to her affiliation with former Alabama Governor Fob James. (*Id.* at 13.) The alleged harassment took the form of "reduced proficiency ratings, delays in promotions and obstruction of professional advancement," in addition to a lowered "performance evaluation." (*Id.* at 11.) Also, she was reassigned to work under a different supervisor and her employment was made "so difficult and so stressful that she was forced to retire." (*Id.* at 13, 15.) Finally, she alleges that she was paid a lesser salary

than her male counterparts. (*Id.* at 12.) Brenda Adair's daughter Joey Adair was also a former ADECA employee who was offered reinstatement after, taking a brief leave of absence; when she tried to accept said offer, however, Defendants allegedly prevented Joey Adair from re-employment at ADECA because of who her familial ties. (*Id.* at 17.)

On the basis of said events, Brenda Adair has filed six causes of action, and her daughter Joey has filed one. The Defendants are ADECA, Nick Bailey in his official capacity as Acting Director of ADECA ("Bailey"), Stephen C. Walkley ("Walkley"), Raymond A. Clenney ("Clenney"), and James Littleton ("Littleton"). The later three Defendants ("individual Defendants") are sued in their individual capacity.[1] The first two counts of the Amended Complaint are brought against ADECA pursuant to Title VII. ADECA does not move for judgment on said counts, so the following discussion will focus only on the remaining counts in the Amended Complaint.

Count III

Count III of the Amended Complaint alleges gender discrimination under the Equal Pay Act, codified at 29 U.S.C. § 206(d)(1). This claim, too, is brought only against ADECA. Brenda Adair merely alleges that she "was paid a lesser salary than her male counterparts" who essentially performed the

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[1] The Amended Complaint does not specifically refer to the capacity in which the individual Defendants are sued other than Bailey who is explicitly sued in his official capacity "as Acting Director of ADECA." (Am. Compl. at 1.) Because no allegations have been made suggesting that the remaining individual Defendants were in any sense policymakers as the term has been defined by the Eleventh Circuit, the court finds that the suit has been brought against them in their individual capacity only. *Compare Farred v. Hicks*, 915 F.2d 1530, 1532-33 (11th Cir. 1990) (holding that suit may proceed against government employees in their official capacity when the complaint contains an allegation that said employees were acting in accordance with a municipal policy).

same duties. (Am. Compl. ¶ 12.) ADECA avers that the Equal Pay Act creates exceptions for those employees subject to a merit system and asks the court to recognize that state employees are, in fact, subject to the Alabama State Merit System. (Mot. at 5-6.) The court recognizes as much but does not believe such facts lead to the conclusion that Brenda Adair was required to explicitly define "counterpart" with reference to the Merit System. Rule 8(f) requires a broad interpretation of pleadings so as to do substantial justice, and the court finds that, by counterpart, Adair referred to a similarly situated male in all relevant respects, including merit classification. If it is true that Adair received equivalent pay upon consideration of the Merit System, ADECA could have so argued in a summary judgment motion. As the Amended Complaint stands, however, the allegations, if taken to be true, do not show beyond a doubt that judgment is due to be granted in favor of ADECA. Accordingly, Defendants' Motion is due to be denied as to Count III.

Count IV

In this Count, Brenda Adair seeks injunctive relief against Bailey under the Equal Protection Clause, as well as damages from the Walkley and Clenney. The individual Defendants move for partial judgment on the grounds of qualified immunity. While Rule 8 gives Plaintiffs significant leeway in the language used in their Amended Complaint, the Eleventh Circuit imposes a heightened pleading requirement in Equal Protection claims brought against government employees in their individual capacities pursuant to 42 U.S.C. § 1983. *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998) . The facts alleged must be specific enough, so that the court can determine whether or not the "defendant's actions violated a clearly established right." *Id.*

The specific language of the Count alleges no more than that Brenda Adair "has been the victim of gender discrimination by the Defendants while they were acting under the

color of state law, usage, or custom, in violation of the Equal Protection Clauses of the United States Constitution and of the Constitution of Alabama of 1901."[2] (Am. Compl. ¶ 28.) The Count also requests compensatory and punitive damages from each individual Defendant, while referencing the allegations set out previously in the Amended Complaint. (*Id.* at 27, 29.) Such facts, exhaustively state that the individual Defendants "have, from time to time" subjected her to harassment "in retaliation for having participated" in the lawsuit against ADECA. (*Id.* at 11) They also "resumed and intensified harassment . . . because of her gender." (*Id.* at 13.) These are the only allegations offered against the individual Defendants that touch upon her gender.

The Eleventh Circuit has never held that government employees may be found liable on equal protection grounds for retaliating against an employee who filed EEOC charges. Although Title VII permits a cause of action in this regard (indeed, Count II of the Amended Complaint alleges as much), the Equal Protection Clause simply does not protect individuals who have filed lawsuits, even if the lawsuit was related to one's protected classification under the Equal Protection Clause. *Cf. Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1576 (5th Cir. 1989) (suggesting that a plaintiff may be able to bring a retaliation claim under Title VII and the First Amendment upon filing an EEOC charge). Moreover, resumption and intensification of harassment are far too vague to satisfy even notice pleading, let alone the heightened pleading standard under Section 1983; without some specificity as to the instances of

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[2] Plaintiffs do not state any basis upon which the court might exercise jurisdiction over the state law issue. As such, the court dismisses all claims brought alleging violations of the Alabama Constitution. Moreover, it is worth pointing out that the Supreme Court of Alabama explicitly has held that no such right exists under the Alabama Constitution. *Ex Parte Melof*, 735 So. 2d 1172 (Ala. 1999).

harassment upon which Adair bases her claim, the individual Defendants are entitled to qualified immunity. *See Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1495 (11th Cir. 1992) (holding that "some factual detail is necessary" in a Section 1983 pleading, especially when qualified immunity is at issue). As such, the Equal Protection claims against them are due to be dismissed.

Count V

Brenda Adair also brings a First Amendment claim against the individual Defendants, alleging that they "retaliated against . . . [her] for having exercised her rights to free speech and expression under the United States Constitution." (Am. Compl. ¶ 31.) She also seeks injunctive relief against Bailey, presumably under the theory he "approve[d] his subordinates actions and "the basis for" said actions. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (delineating baseline for official capacity liability when policymaker is not direct actor in constitutional violation.). Again Court V provides no factual allegations beyond a reference to those set out previously. The only possible instances of speech in which Adair engaged were her filing of the EEOC charge and her allegations as to the misuse of federal funds.[3] Defendants

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[3] Adair also argues that her connections with former Governor Fob James are protected by the First Amendment, which may be true under the freedom of association, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990), but her Amended Complaint alleges only "retaliation for the exercise of free speech." (Am. Compl. Count V.) She has not alleged that she ever uttered any speech about Fob James. Adair wishes for the court to provide an extremely liberal application of Rule 8(f), by not only drawing facts from prior allegations, but also applying unalleged legal theories to said facts. While the court might not be altogether disinclined to so act, it notes that Count VI is phrased in the form of a freedom of association claim. (*Id.* at Count VI) Wherever the limit on lenience lies under Rule 8(f), surely it does not extend to rephrasing one legal theory to fit certain facts when the theory has already been pleaded under a different set of facts.

contend that, not only do the facts give rise to a cause of action, even if they did, they would be protected by qualified immunity.

The court recognizes that the Eleventh Circuit has left open the possibility that the filing of an EEOC charge might, in certain circumstances, constitute speech of sufficient "public concern" to merit First Amendment protection for government employees. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530 n.6 (11th Cir. 1997). The question of whether protection is afforded is fact-specific, depending on the particular allegations in the EEOC charge and the relief sought. *Id.* Plaintiff has not alleged the substance of said EEOC complaint so the court cannot determine either its content or its context. Certainly at this stage of the proceedings, the court must accept Adair's allegations that it was a complaint of sufficient public concern. However, the Eleventh Circuit has held that, given the highly fact-intensive nature of First Amendment cases, defendants in such cases "rarely act within clearly established contours of law." *Hansen v. Soldenwagner*, 19 F.3d 573, 575 (11th Cir. 1994). Indeed, the only Eleventh Circuit caselaw touching upon the protected status of EEOC charges held that the charge in question was not protected speech. The court finds such precedent to be insufficient to put the individual Defendants on notice that they were infringing upon Brenda Adair's rights.

Similarly, the court finds that Defendants could not have known that Adair's alleged complaints as to the misuse of federal funds was protected speech. Plaintiff cites *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998), in support of the contrary conclusion, but that case actually held that a police officer's speech was not of sufficient public concern as to merit First Amendment protection. *Id.* at 1383. In that case, a police officer filed an accident report concerning a crash involving a fellow officer driving eighty miles per hour over

the speed limit. *Id.* at 1381. When deposed in a subsequent wrongful death lawsuit, the officer commented on the "great possibility" that the accident would not have occurred if not for his fellow officer's negligence. *Id.* The Eleventh Circuit held that, regardless of what interest the public might hold in such information, because the statements were made primarily in his role as employee, they did not constitute speech of a public concern. *Id.* at 1382. Accordingly, his subsequent termination was not protected by the First Amendment. *Id.*

A case more favorable to Brenda Adair's argument, perhaps is *Fikes v. City of Daphne*, 79 F.3d 1079 (11th Cir. 1996). In that case, the Eleventh Circuit reversed the dismissal of a plaintiff's complaint on the grounds that the allegations stated a possibility that the speech in question could be regarded as of sufficient public concern. *Id.* at 1084. In this case, a police officer reported to his supervisor that another officer's insubordination resulted in the death of four citizens. *Id.* at 1083. The complaint alleged that when the officer's reports were repeatedly ignored, he sought the Alabama Bureau of Investigation to look into the possibility that there was a conspiracy. *Id.* At this point, he was fired, allegedly due to his persistent pursuit of the matter. *Id.* The Eleventh Circuit held that whistleblowers who attempt to bring to the public's attention internal police corruption should be afforded the protection of the First Amendment given the public concern surrounding such issues. *Id.* at 1084.

In the present matter, Plaintiffs allege merely that Brenda Adair "voiced allegations about the misuse of federal funds at ADECA." There is no suggestion that she was onto a vast conspiracy of corruption within ADECA. Nor is there any allegation that she sought to inform the public at large about the alleged misuse of funds. Indeed, the Amended Complaint includes only a general allegation from which the court cannot determine the party to whom her comments were

made. Even if the court were to assume that Adair was especially vociferous in making her internal complaints so that her speech could be regarded as of sufficient public concern, qualified immunity would nonetheless be appropriate. The individual Defendants could not have been expected to determine whether the content and context of Adair's grievances were of sufficient public concern, so Count V is due to be dismissed as to these Defendants.

Moreover, the court observes that Adair has not alleged sufficient basis for a finding that the alleged retaliation was of the type to invoke municipal liability. There is no allegation that Bailey ever retaliated against Adair, or indeed, that he was ever aware of her statements. (Am. Compl. ¶ 31.) Nor does her Amended Complaint allege that there was an official policy of First Amendment retaliation within ADECA. At most, the Amended Complaint makes reference to the possibility that the individual Defendants "were acting under color of state . . . custom," but such a conclusory allegation is insufficient to put Bailey on notice as to the purported basis of liability. *See, e.g., Classroom Teachers of Dallas/Texas State Teachers, Association National Educ. Ass'n v. Dallas Independent School Dist.*, 164 F. Supp. 2d 839, 848 (N.D. Tex. 2001) (dismissing municipal liability claim in First Amendment case because plaintiff was required "to identify [a] specific policy or custom and allege that the policy or custom adopted by . . . a policymaking official was the 'moving force' behind the alleged constitutional violation"). Without more, the court concludes that Brenda Adair's First Amendment claim is due to be dismissed in its entirety.[4]

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[4] This conclusion is to be distinguished from Counts IV and VI where the court permits the official capacity claim against Bailey to stand. The reason for this is that the facts underlying both claims amount to ultimate employment decisions such as constructive discharge and the failure to hire. By definition, both types of employment actions are imputed to an employer, for only an official has hiring authority or the authority to

Count VI

This is the only count alleged by Joey Adair. She alleges that, after taking a leave of absence, her application was overlooked due to undue influence of Defendants Walkley and Littleton. She seeks equitable relief against Bailey, as well as compensatory and punitive damages against the individual Defendants. As with the other counts, the individual Defendants seek qualified immunity on this claim.

The court observes that the Eleventh Circuit's general rule that qualified immunity in the First Amendment context does not so readily apply to a freedom of association claim. The reason for this is twofold. First, unlike with a free expression case, there is no requirement that the association be of a public concern. *Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb County*, 809 F.2d 1546, 1558 (11th Cir. 1987). Second, seldom is it the case that the individual with whom an employee associates of the type that it would unnecessarily disrupt an employer's business operations. *Cf. Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that the analysis of a First Amendment retaliation claim requires the court to balance an employer's interest in maintaining an efficient workplace against the weight accorded to the employee's First Amendment rights). The fact that both Plaintiffs concurrently worked at ADECA negates this argument. Accordingly, Joey Adair needs to prove only that her status as Brenda Adair's daughter was a substantial

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prevent the circumstances leading up to constructive discharge. First Amendment retaliation claims, however, cover a much broader range of adverse employment actions not amounting to ultimate employment decisions. *Rutan*, 497 U.S. at 76 n.8 (holding that the First Amendment protects against "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights") (internal quotations omitted). In such instances, an employer's liability can be invoked only by evidence, and hence allegations, that it in some way condoned such actions.

motivating factor behind her failure to be rehired by ADECA. *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993).

The court finds that she has sufficiently alleged facts to create a cause of action. Indeed, she has alleged that the individual Defendants "prevailed upon those who were responsible for the selection of appointees" to bypass her, and that this was the sole reason she was not rehired. (Am. Compl. ¶ 17.) The court acknowledges that the language "prevailed upon" is not the paragon of clarity, but it is not so unclear that it could not have provided notice to the individual Defendants. Unlike in the context of the Equal Protection claim where the conclusory language of harassment could not provide specificity as to any actions within the ten-year span of Brenda Adair' s claim, Joey Adair's claim provides a specific time frame and context as to the individual Defendants' alleged actions. Whether or not they interfered in any way with the decision to rehire Joey Adair is a matter they can contest at trial, the allegations are specific enough to permit them to prepare an adequate defense. Moreover, if true, the allegations constitute 'natters clearly within established law. *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) (holding that, in the freedom of association context, the term "'adverse employment action' is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands"). Accordingly, Joey Adair's First Amendment claim should not be dismissed.

Count VII

Finally, Brenda Adair brings a claim under the Family Medical Leave Act, alleging that she was retaliated against for having taken FMLA leave. Although the Amended Complaint seeks appropriate relief against ADECA, Walkley, and Clenney, Plaintiffs have subsequently admitted that FMLA claims can be brought only against an employer. (Dot. No. 47 at 10-11.) Moreover, she acknowledges that ADBCA

may not be subjected to monetary damages insofar as it is an arm of the State of Alabama. *See Bylsma v. Bailey*, 127 F. Supp.2d 1211, 1233 (PLC. Ala. 2001) (finding that the Eleventh amendment prohibits suits for money damages against state entities pursuant to the FMLA). Plaintiffs contend, however, that injunctive relief is available against ADECA. The court is uncertain as to what "equitable relief . . . may be appropriates' in the present circumstances. 29 U.S.C. § 2617 (1) (B) . The only allegations in the Amended Complaint indicate that one employee unsuccessfully made "efforts" to "deny, restrict, or confine" Adair' s access to FMLA benefits, and that Walkley and Clenney "caused [her] performance evaluation to be lowered in retaliation" for successfully accessing said benefits. (Am. Compl. ¶ 11.) Nonetheless, the cart need not be placed before the horse; the court can concern itself with the "appropriate" remedy should the facts support as much. For present purposes, it is enough to say that Brenda Adair's FMLA claim may proceed against ADECA for injunctive relief.

II. ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that the court's order dated January 14, 2002 (Doc. No. 40) be and the same is hereby VACATED. Furthermore, it is CONSIDERED and ORDERED that Defendants' Motion For Partial Judgment be and the same is hereby GRANTED in part and DENIED in part as follows:

(1) Count IV of the Amended Complaint is due to be DISMISSED as to Defendants Walkley and Clenney;

(2) Count V of the Amended Complaint is due to be DISMISSED as to all Defendants; and

(3) Count VII of the Amended Complaint is due to be DISMISSED as to all Defendants except ADECA against whom the present action may proceed for injunctive relief only.

DONE this 11th of February 2002.

/s/ [Illegible]
UNI.ED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Apr. 24, 2002]

Civil Action 00-D-1562-N

BRENDA ADAIR, *et. al.*,
Plaintiffs,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, *et. al.*,
Defendants.

ORDER

The court heard arguments and testimony in his jury trial from April 8th through April 10th, 2002. The following claims were tried: 1) a gender-based hostile work environment claim under Title VII of the Civil Rights Act of 1964 ("Title VII") by Plaintiff Brenda Adair ("Plaintiff")[1] against the Alabama Department of Economic and Affairs ("ADECA") which allegedly resulted in her constructive discharge; 2) a Title VII retaliation claim by Plaintiff against ADECA; 3) an Equal Pay Act claim by Plaintiff against ADECA; and 4; a retaliation claim under the Family and Medical Leave Act ("FMLA") by Plaintiff against Defendants ADECA, Stephen Walkley ("Walkley"), and Raymond Clenney ("Clenney").

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[1] Although Joey Adair, daughter of Brenda Adair, was also a Plaintiff in this case, her claims are not the subject of this Order, and thus any reference to "Plaintiff" herein refers to Brenda Adair.

Defendants moved for judgment as a matter of law after Plaintiff rested. The court reserved ruling on the matter at that time, Before Defendants finished presenting their case, Plaintiff prudently withdrew her Equal Pay Act claim against ADECA and her FMLA retaliation claim against Defendants ADECA, Walkley, and Clenney. At the close of Defendants' presentation of evidence, they again moved for judgment as a matter of law on Plaintiff's remaining claims. The court heard oral arguments on the motion, and found that Defendant ADECA was entitled to judgment as a matter of law as to all of plaintiff's claims that remained in the case. This Order is in support of the court's decision, presented orally at trial, as to why judgment as a matter of law was entered in favor of Defendants regarding Plaintiff's remaining claims, as described above.

I. STANDARD FOR A JUDGMENT AS A MATTER OF LAWS

Pursuant to Rule 50(a) of the *Federal Rules of Civil Procedure*, judgment as a matter of law is warranted where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or that party." Fed. R. Civ. P. 50(a). On a motion for judgment as a matter of law, the court construes the evidence and factual inferences in the light most favorable to the nonmoving party. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999).

As explained in *Mendoza*,

> Although the existence o a genuine issue of material fact precludes judgment as a matter of law, "a jury question does not exist because of the presence of a 'mere scintilla of evidence'." A motion for judgment as a matter of law will be denied only if "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." These standards

> require [the court] to consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." "If the facts and inferences point overwhelmingly it favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted."

Id. (internal citations omitted).

II. PLAINTIFF'S CLAIMS

A. *Pertinent Facts*

Plaintiff was employed with the State of Alabama for thirty-one years, and with ADECA for thirteen years. Or July 27, 2000, she announced her retirement, which became effective August 31, 2000. Plaintiff then began receiving retirement benefits of $36,000 per year from the State of Alabama.

In this case, Plaintiff's Pretrial Order essentially outlined three claims that remained in the case after she dropped her Equal Pay Act and FMLA claims. First, she claimed that, for approximately one-and-a-half years preceding her retirement, which became effective August 31, 2000, her work environment was so hostile or abusive that a reasonable person in her circumstances would have found her workplace to be permeated with discriminatory intimidation, ridicule, insult, or threatening, bellicose, demeaning or offensive conduct, that was so "severe or pervasive" as to alter the terms, conditions, or privileges of that person's employment. *See Rojas v. Florida*, No. 01-11-7-, 2002 WL 448490, at *4 (11th Cir. March 22, 2002); *Watkins v., Bowden*, 105 F.3d 1344, 1335 (11th Cir. 1997); *Bell v. Crackin Good Bakers. Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985). Second, Plaintiff alleged that her work environment became so intolerable that a reasonable person in her position would have felt compelled

to resign, and thus she did not actually retire, but was constructively discharged." *See Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996). She claims that her harassment was based on her gender. Third, Plaintiff claims that adverse employment actions were taken against her in the last year-and-a-half before her retirement in retaliation for her having filed EEOC claims and a lawsuit in 1990. The claims were settled in 1991.

In support of her allegations, Plaintiff's contentions in the Pretrial Order contained several broad and duplicative allegations, and a few specific allegations, of actions which she claims were harassing in nature and stemmed from a retaliatory motive on the part of Defendants.

The testimony at trial showed that the actions which Plaintiff claimed to be harassing and stemming from a retaliatory motive did not rise to the level of Title VII violations. The narrative, construed in a light most favorable to Plaintiff, is presented below.

Sometime in 1998, while she was working in the Law Enforcement Traffic Safety ("LETS") Division of ADECA, Plaintiff was eating lunch with her friend Linda Hart ("Hart"), Director of the Workforce Development Division ("WDD") of ADECA. Plaintiff brought up the subject of transferring to the WDD to work with Hart. Although Plaintiff knew that Steve Davis, one of the supervisors against whom she had filed claims in 1990, worked in WDD, Plaintiff still wanted to transfer to that division so that she could work with Linda Hart. That same year, Plaintiff began work for Hart in the Welfare-To-Work ("WTW") Department of the WDD. Plaintiff was classified by the State's merit system as a Planning and Economic Development Level III ("PED-III"). Plaintiff had one person working under her after she transferred to the WDD, a clerical assistant named Linda Gamble. Plaintiff was very frustrated working in the WTW program. The program was based on grants. The federal government would match

two-to-one every dollar that the State gave to the program. The cause of Plaintiff's frustration was that the state was not giving any money to the program.

In January, 1999, Stephen Walkley ("Walkley"), classified by the merit system, as a Planning and Economic Development Level. IV ("PED-IV"), became the acting director of the WDD after a change in state administration. He was officially appointed to the position in October 1999. That same month, the WDD began a reorganization. At this time, the WDD employed approximately fifty-five people. The WDD was in the process of changing its main source of federal funds from the Job Training Partnership Act to the Workforce Investment Act ("WIA"). However, the WDD still planned to maintain the WTW program, and still does. When the reorganization began, Walkley sought input from the people that reported directly to him as to the best way to reorganize the WDD. Walkley received a memo from Plaintiff indicating that she would like to go to one of four places when the reorganization occurred. Walkley placed Plaintiff in the State Planning and Rapid Response Section, one of the four places she requested. The supervisor of the section was Ray Clenney ("Clenney"), a PED-IV. Plaintiff was to wor with plans regarding the WTW program, which Walkley considered to be her area of expertise, and issues relating to the WIA. Shortly after the reorganization, Plaintiff requested a transfer because her new position required working with Steve Davis, another PED-III, against whom she had brought claims in 1990. However, at that time he had been her supervisor, and after the reorganization he was not, and had not been for several years. To ensure that there was no confusion as to who would be supervising Plaintiff, Walkley sent her a memo, denying her request to transfer, and informing her that 1) Ray Clenney, not Steve Davis, was now her supervisory 2) Ray Clenney would provide her assignments and review and evaluate her work; 3) Ray Clenney may at times leave Steve Davis as Acting Section Supervisor

in his absence, but that Davis would not be reviewing her work unless she asked him to; and 4) if she felt that she was being subjected to a hostile work environment at any time, she should inform her supervisor immediately. Clenney also left Plaintiff as acting supervisor, at times. Walkley did not transfer Plaintiff because he believed that her experience with WTW was valuable to the state planning section and that no transfer was necessary because he had made sure she was not supervised by Steve Davis.

During the reorganization, Linda Gamble was moved from working for Plaintiff because the planning section to which Plaintiff moved already had clerical assistance available. This is the alleged loss in supervisory authority in Plaintiff's claim. However, Plaintiff admits that beginning in January 1999, there was not much work to do in the WTW area, and that one person could handle the position, and that there was no reason to have two people in the program. Plaintiff claims that Walkley excluded her from supervisory meetings after the 1999 reorganization in retaliation for her 1990 claims against ADECA. *See Maniccia v. Brown*, 171 F.3d 1364, 1369-70 (11th Cir. 1999). However, Plaintiff, supervised by Clenney, was not a supervisor, had no supervisory duties, and thus had no reason to attend such meetings.

From October 1999 until January 2000, Plaintiff used her annual leave to have sinus surgery. With the exception of a couple of days. Plaintiff was absent from work for more than two months. Plaintiff took sick leave from March 13 to March 17, 2000. In mid-May, 2000, Plaintiff had surgery on a herniated disc, and was out until July. However, she had problems recovering from the surgery, and needed more time to heal, so she was given donated sick leave by Clenney (her supervisor) and Bill Hornsby (a co-worker). Using the donated sick leave, Plaintiff did not work from July 9 to July 25, 2000. Thus, Plaintiff was again absent from work from approximately May 15, 2000 to July 25, 2000. On

July 27, 2000, she filed a notice of retirement. No evidence was presented that related Plaintiff's need for sinus and disc surgery to her job.

Plaintiff's job performance was evaluated annually. Ray Clenney performed Plaintiff's evaluation from February 1, 1999 to February 1, 2000. From 1997 to February 1999, Plaintiff had received ratings between 38.53 and a perfect 40. Any rating above a 36.7 falls into the "Consistently Exceeds Standards" range. For 1999, Clenney rated Plaintiff a 28.3, which falls into the "Exceeds Standards" category. Plaintiff was upset, believing that she instead should have received a 38.33, and thus would not sign the performance evaluation sheet. However, Walkley did sign it, and asserted that he thought the score was fair. Clenney had been Plaintiff's supervisor from October 1999 until February 2400. However, as previously discussed, Plaintiff had been absent from work for most of the time Clenney had been her supervisor. In addition, Plaintiff admitted that during 1999, there were no WTW proposals to review, because the program was not being funded at that time. While Plaintiff claims her opportunities for promotion were impeded, the evidence belies such a claim, because Plaintiff did not score high enough on the state-given exam to be promoted from a PED-III to a PED-IV. This decision was made by the State merit system, not ADECA.

Plaintiff also claims she was not given proper training for her position. However, this claim is also belied by the evidence. For example, the evidence showed that between March and July 2000, Plaintiff attended at least four training sessions in Atlanta, Georgia, three of which pertained to the WTW program and one of which pertained to the WIA program. The evidence established that Plaintiff was on leave for ore week in March 2000; from mid-May until July 2000; and, with the exception of a couple of days, from October 1999 until January 2000. The only training session which

Plaintiff contends she unsuccessfully sought to attend was a Southeastern Employment and Training Association ("SETA") 2000 Spring Conference, which was held March 19-22, 2000, in Asheville, North Carolina. However, Plaintiff was at the same time attending a training session in Atlanta, Georgia.

B. *Discussion*

None of the Defendants' actions, whether considered alone or cumulatively, violate Title VII. Defendants' actions were not retaliatory because there was no serious or material change in the terms conditions, or privileges of Plaintiff's employment, as is required in order to prevail on a claim of retaliation. *See Davis v. Town of Lake Park Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001). Defendants' actions did not create a hostile work environment, as no reasonable person could have found that Plaintiff's work environment was so permeated "with discriminatory intimidation, ridicule, and insult," or "threatening, bellicose, demeaning, hostile, or offensive conduct," that was so "severe or pervasive [as] to alter the conditions or the employment and create an abusive working environment." *Rojas v. Florida*, No. 01-11070, 2002 WL 448490, at *4 (11th Cir. March 22, 2002) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)); *Bell*, 777 F.2d at 1503. Plaintiff's evidence is in stark contrast to that found to be sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment in other cases. *See, e.g., Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997) ("Stripped of all responsibility, given only a chair and no desk, and isolated from conversations with other workers, Poole has presented evidence suggesting that a reasonable person might find the conditions under which she was working intolerable."). *See also, Mendoza v. Borden. Inc.*, 195 F.3d 1238, 1246-47 (11th Cir. 1999) (setting out examples of what is and is not considered sufficiently severe or pervasive to create a hostile work environment).

Plaintiff's claim that she actually did not retire, but instead was "constructively discharged" from her position, is also unsupported by the evidence. Plaintiff has not shown that Defendants made her employment "so intolerable" that a reasonable person in her position "would be compelled to resign." *Kilgore*, 93 F.3d at 754. As the court has found that Plaintiff's evidence is insufficient to meet the minimum required to establish a hostile work environment, the court finds that the same evidence is insufficient to establish a claim of constructive discharge. *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001) ("The standard for proving constructive discharge is higher than the standard for proving a hostile work environment.").

DONE this 24th day of April, 2002.

/s/ Truman Hobbs
TRUMAN HOBBS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Sep. 12, 2002]

Civil Action 00-D-1562-N

JOEY ADAIR, *et al.*,

Plaintiffs,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, *et al.*,

Defendants.

ORDER

The attached Order was written and signed on June 24, 2002, but due to inadvertence and the undersigned being on vacation during most of the period from its signing to this date, the order was not filed nor was it communicated to the attorneys until this date.

DONE this 12th day of September, 2002.

/s/ Truman Hobbs
TRUMAN HOBBS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Sep. 12, 2002]

CIVIL ACTION 00-D-1562-N

JOEY ADAIR, *et al.*,

Plaintiffs,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, et al.,

Defendants.

ORDER

Before the court is a Motion To Alter, Amend, Or Vacate Judgment Under Rule 59, filed by Plaintiffs Joey Adair and Brenda Adair on June 10, 2002. Therein, Joey Adair requests the court to change its decision granting qualified immunity to Defendants Stephen Walkley and James Littleton. Plaintiff Brenda Adair requests the court to change its decision dismissing her claims based on retaliation under the First Amendment and gender discrimination based on Title VII. After careful consideration of Plaintiffs' arguments, the relevant law, and the record as a whole, the court finds that Plaintiffs' Motion is due to be denied.

I. RULE 59(e) STANDARD

"[C]ourts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to

account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Stators*, 994 F.2d 1076, 1081 (4th Cir. 1993).

II. DISCUSSION

A. *Joey Adair And Qualified Immunity*

The court focuses its analysis of qualified immunity on the objective reasonableness of the actions of Defendants Walkley and Littleton.

> When an individual defendant moves for summary judgment based on qualified immunity, a district judge "must determine whether there is a genuine issue of material fact as to whether the defendant committed conduct that violated clearly established law." *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996). This decision involves a two- part analysis: (1) defining the official's conduct, based on the record and viewed most favorably to the non-moving party, and (2) determining whether a reasonable public official could have believed that the questioned conduct was lawful under clearly established law. *See id.; Mencer v. Hammonds*, 134 F.3d 1066, 1070 (11th Cir. 1998).

Koch v. Rugg, 221 F.3d 1283, 1295 (11th Cir. 2000) (footnote omitted).

Plaintiff Joey Adair argues that:

> Defendants were surely placed on notice or given fair warning that the state could not terminate an individual because of his or her personal relationships and that to do so was a violation of that individual's first amendment rights. First Amendment law is so basic and fundamental to our democratic society, that it would be

> doubtful that Defendants were unaware of the freedom of association rights associated with the First Amendment.

(Mot., ¶ 6.) It is true that "[c]ase law is not always necessary to clearly establish a right. A right may be so clear from the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official." *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002) (citation omitted). It is also true that "a general constitutional rule set out in preexisting case law may apply with obvious clarity to the specific circumstances racing the official. The official's conduct may be so egregious that an objective and reasonable official must have known it was unconstitutional without any fact-specific case law on point." *Id.* (citations omitted). On the other hand, "[s]uch exceptions are rare . . . . The general rule is that '[g]eneral propositions have little to do with the concept of qualified immunity. If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.'" *Id.* (citation omitted).

The court accepts the argument of Plaintiff that the conduct of Walkley and Littleton violated a general proposition of constitutional law.[1] Although not cited by Plaintiff, the court

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[1] The court notes Plaintiff's citation of *Chesser v. Sparks*, 248 F.3d 1117 (11th Cir. 2001) and *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984) (overruled on other grounds). (Pl. Mot. ¶¶ 3-7.) However, such cases do not change the court's finding on qualified immunity. In *Wilson*, the court held that a city violated a police officer's freedom of association when he was fired for dating a girl whose father was a convicted felon and a former organized crime figure in Florida. 733 F.2d at 1540, 1544. The court made clear that it was "a narrow holding." *Id.* at 1544 n.3. In *Chesser*, the plaintiff argued that the county commissioner had violated her right to freedom of association when it terminated her because of her relationship with her husband, a political enemy of the commissioner's. 248 F.3d at 1120, 1124-25. The court cited *Wilson*, in a footnote, noting that the *Wilson*, court did not employ the balancing test set forth in

finds that the proposition was established in a five to four decision of the Supreme Court of the United States in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and in the evolving law flowing from said decision. In *Rutan,* the Court held that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Id.* at 75. The case arose out of an order of the Governor of Illinois prohibiting any vacancy over which he had control from being filled without his express permission. *Id.* at 65. The order was allegedly used to limit such vacancies being filled by persons not in the Governor's political party. *Id.* at 66-68. *Rutan* set forth the prohibition against a government entity making promotion, transfer, recall, and hiring decisions based on its employees' exercise of their First Amendment rights of freedom of association. *Id.* at 76, 79. The dissent noted that this was the first time that the First Amendment had been applied in such a manner to government employment. *Id.* at 94 (Scalia, J., dissenting). The parameters of the case are still being worked out by the lower courts.

In his closing argument, Plaintiff's counsel argued to the jury that it needed to find for Plaintiff because it would be the

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Pickering v. Board of Education, 391 U.S. 563 (1968), for determining whether an adverse employment action is permissible. Therefore, the court held, *Wilson* would not have informed "a reasonable government actor in [the defendant county commissioner's] shoes that he would infringe [the plaintiff's] constitutional right of intimate association if he terminated her employment." *Id.* at 1125 n.10. The court likewise distinguishes both *Wilson* and *Chesser* from the case at hand. It was clear in those cases that the allegation was that someone was fired because of their marriage or dating relationship. There was no mention of re-hiring in those cases. Thus, it would not likely have been clear to Walkley and Littleton, from *Wilson* and *Chesser*, that failure to re-hire Joey because her mother alleged discrimination against ADECA violated Joey's right to freedom of association.

first time that an individual's freedom of association would be determined to be protected under the particular facts of this case. The court agrees with Plaintiff's counsel. Thus, the court is not convinced that a reasonable public official in the position of Walkley or Littleton would have known that failing to rehire Joey Adair because her mother filed a lawsuit against ADECA violated the First Amendment. *See Maggio v. Sipple*, 211 F.3d 1346, 1354 (11th Cir. 2000) ("To defeat a defendant's claim to qualified immunity, a plaintiff must show that a reasonable person in the defendant's position would have been on notice that his actions violated clearly-established law."); *see also, Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1270 (11th Cir. 2000) ("Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit.") (citation and quotations omitted). Although it may be clear to a judge or a lawyer, who is well-versed in the law, based on *Rutan*, that the conduct of Walkley and Littleton violated Plaintiff's right to freedom of association under the First Amendment, the court does not believe that Walkley and Littleton were in a position where they would have been aware that their opposition to Joey Adair's re-hire violated the law. The court finds that, even if they knew about *Rutan*, it would not have been clear to Walkley and Littleton that it applied to their conduct in this case, as opposed to the political affiliation context in which it was originally applied. The court believes that employers and supervisors can be held to know that it is illegal for them to engage in certain conduct, such as discrimination. However, the court simply cannot extend liability for such constructive knowledge to the broad spectrum of First Amendment rights and in particular to the right of association involved in Joey Adair's claim.

Further, the court does not believe that Plaintiff's right to freedom of association in this case was "so clear from the text

of the Constitution . . . that no prior decision is necessary to give clear notice of it to an official." *Rowe*, 279 F.3d at 1280 n.10. Nor is there any evidence in this case that the conduct of Walkley and Littleton "was so egregious that an objective and reasonable official" in their positions would have known their *actions were* "unconstitutional even without any fact-specific caselaw on point." *Id. See Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1170 (11th Cir. 2001).

Based on the foregoing, Walkley and Littleton are entitled to qualified immunity on Plaintiff Joey Adair's claim of retaliation *in violation* of her freedom of association.[2]

B. *Brenda Adair's Claims*

1. First Amendment Retaliation

Regarding Plaintiff's claim against Defendants Walkley and Raymond Clenney ("Clenney") for retaliation in violation of her right to free speech under the First Amendment, the court relies on the reasoning of Judge DeMent's Order entered February 11, 2002. Therein, the court found that it was questionable whether Plaintiff even exercised her right to free speech, but even if she did, the court found that Defendants were entitled to qualified immunity on the claim.

2. Title VII Gender Discrimination

Regarding Plaintiff's claim against Defendant ADECA, the court relies on the reasoning of its Order entered April 24, 2002. Therein, the court found that there were no serious and

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[2] The court notes Plaintiff Joey Adair's argument that "the judgment under 42 U.S.C. § 1983 in favor of Joey Adair should have been against Ann Payne in her official capacity as the Director of ADECA [substituted for Nick Bailey] instead of against ADECA itself." However, "as long as the government entity receives notice and an opportunity to respond [which it did in this case, as a party], an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 166 (1985).

material changes in the terms, conditions, or privileges of Plaintiff's employment, as required in order for Plaintiff to prevail on a claim of retaliation. *See Davis v. Town of Lake Park. Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001). Plaintiff has provided no new evidence or argument to convince the court otherwise.

III. ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Plaintiff's Motion To Alter, Amend, or Vacate Judgment be and the same is hereby DENIED.

DONE this 24th day of June, 2002.

/s/ Truman Hobbs
TRUMAN HOBBS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Oct. 21, 2003]

No. 02-15750-II

BRENDA ADAIR, JOEY ADAIR,
Plaintiffs-Appellants,

versus

ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, STEPHEN C. WALKLEY, RAYMOND A. CLENNEY, JAMES A. LITTLETON, ANN PAYNE, Director of ADECA,
Defendants-Appellees,

NICK D. BAILEY, Acting Director of the Alabama Department of Economic and Community Affairs, *et al.*,
Defendants.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARINF EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____)

Before: TJOFLAT, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Murray
STANLEY MURRAY
UNITED STATES CIRCUIT JUDGE

APPENDIX G

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges. Or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3. Other unlawful employment Practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

APPENDIX H

UNITED STATES CONSTITUTION, FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a) Claims for Relief

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(2)

Supreme Court, U.S.
FILED
APR 16 2004
OFFICE OF THE CLERK

No. 03-1047

IN THE

Supreme Court of the United States

BRENDA ADAIR and JOEY ADAIR,
Petitioners,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, and ANN PAYNE, as its Director, RAYMOND A. CLENNEY, STEPHEN C. WALKLEY, and JAMES A. LITTLETON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR REHEARING

ALVIN T. PRESTWOOD *
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has granted qualified immunity protection to state officials who, acting under state law, have deprived a daughter of rights because of said daughter's relationship with her own natural mother?

2. Whether this Court needs to re-examine its decision not to grant the Petition for Writ of Certiorari in order to review the protected relationship between a daughter and her mother.

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IN THE

Supreme Court of the United States

No. 03-1047

BRENDA ADAIR and JOEY ADAIR,
Petitioners,

v.

THE ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, and ANN PAYNE, as its Director, RAYMOND A. CLENNEY, STEPHEN C. WALKLEY, and JAMES A. LITTLETON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR REHEARING

This Court denied the Petition for Writ of Certiorari on March 22, 2004. This Petition for Rehearing is presented under this Court's Rule 44(2). The Petitioners hereby submit other substantial grounds not previously submitted to this Court. The Petitioners specifically submit that the case of *Hope v. Pelzer*, 536 U.S. 730 (2002) is controlling authority in the instant case and that the unpublished opinion in *Spring v. Shelton State Community College*, 71 Fed.Appx. 822 (Table), 2003 WL 21431408 (11th Cir.(Ala.)),is submitted as persuasive authority, and a copy of the opinion is included for this Court's review. (Appendix D, p. 9a)

ARGUMENT

It is close to incomprehensible to these Plaintiffs to imagine that, while these public officials should know that they could not, consistent with the constitution, deny benefits to a person because of his or her association with another human being, they did not have reason to believe that such prohibition extended to the mother-daughter relationship. It is submitted that, if *any* associational relationships whatsoever are recognized as being constitutionally protected, this special and closely-knit one should clearly be known to fall within that protection. To the extent that the Eleventh Circuit decision holds that these officials could not have known that their action in encroaching upon that relationship was unconstitutional, then the Plaintiffs hope that this Court will again examine its tacit approval of that disturbing decision.

The jury in this case concluded that Joey Adair's kinship with her natural mother was "a substantially motivating factor in ADECA's decision not to rehire her."[1]

The Eleventh Circuit decision held that Plaintiff Joey Adair had failed to overcome the qualified immunity defense and rejected the argument that "the supervisory defendants' refusal to rehire Joey Adair because of the litigiousness of her mother so obviously violated the First Amendment on its face that any reasonable state official would have known it at the time." (Appendix A, p. 7a). That holding is highly suspect. The Court of Appeals was correct that Plaintiff's counsel had conceded to the district court that there is no materially simi-

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[1] This conclusive finding makes it difficult to rationalize the Eleventh Circuit's apparent questioning of that motivational factor. The panel referred to the relationship factor by using the qualifying language "if true", and by "accepting for the purposes of their case that Joey Adair has therefore proven a constitutional violation. . . ." (Appendix A, 6a). In this case, the jury has *conclusively* found that the mother-daughter relationship skewed their decision not to rehire Joey Adair.

lar case on point (regarding a mother/daughter case of freedom of association in the employment context), but counsel clearly did so in his argument to the jury to demonstrate that no specific precedent was needed to notify an official that punishment for family association was prohibited.

The Defendants, in denying Joey Adair's constitutional rights, knew or should have known that they were violating Ms. Adair's First Amendment protections regarding her freedom of association with a member of her own family.

The issue now presented is whether the trial court properly dismissed the individual Defendants Walkley and Littleton based upon their qualified immunity defenses. The fact that the Defendants were motivated by a desire to reject Joey Adair's application for rehire because of her relationship with her mother, Brenda Adair, has been established by the jury.

The doctrine of qualified immunity protects public officials from monetary damages liability when their conduct does not violate "clearly established" law. There are two steps to analyzing a qualified immunity issue. First, the Court must determine if the government official's conduct violated a constitutional right. If a violation of a constitutional right occurred, the Court then must determine whether the right was clearly established. A right is clearly established if it is clear to a reasonable government official that his or her conduct was unlawful in light of the circumstances. 42 U.S.C. §1983; *Saucier v. Katz*, 533 U.S. 194 (2001).

The Petitioners pointed out to this Court in their Petition for Writ of Certiorari on page 15 that:

> One way to show that a law is "clearly established," or that the official had fair warning, is to point to a prior similar case, but that is not the only way. In *United States v. Lanier*, 520 U.S. 259, 270 (1997), this Court rejected the "fundamentally similar" requirements and warned against requiring too "extreme a level of factual

> specificity" in determining the issue of qualified immunity. "General statements of law are not inherently incapable of giving fair and clear warning." See *Lanier*, 520 U.S. at 268.

Upon the submission of the original Petition, the case of *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) was not cited by these Petitioners although it is highly relevant to the issues in this case. The *Hope v. Pelzer* decision was rendered on June 27, 2002, only three days after the trial court had denied the Plaintiff's motion to alter, amend or vacate its original judgment in the instant case. The Eleventh Circuit alluded to *Hope v. Pelzer* in its decision. (See Appendix A, p.5a.) At page 739, this Court in *Hope v. Pelzer* said:

> As we have explained, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz,* 533 U.S., at 206, 121 S.Ct. 2151. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [v. *Forsyth,* 472 U.S. 511,] 535, n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

At page 741, this Court in *Hope v. Pelzer* reaffirmed the holding in *Lanier*, and held that:

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier,* we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can pro-

> vide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier,* the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

In the instant case, even though there is no case directly on point involving the mother/daughter relationship and freedom of association in the employment context, the Defendants were obviously on notice that such familial relationships are constitutionally protected in light of *Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984)(Regarding personal relationships), and other precedent.

In *Hope*, at page 739, this Court observed that "the Court of Appeals required that the facts of previous cases be "'materially similar' to Hope's situation," and held that such a "rigid gloss on the qualified immunity standard, though supported by [Eleventh] Circuit precedent,[2] is not consistent with our cases."

In Spring v. Shelton State Community College, 71 Fed.Appx. 822 (Table), 2003 WL 21431408 (11th Cir.(Ala.)), an unpublished opinion herewith being submitted as persuasive authority (Appendix D, pp. 15a, 19a), the Eleventh Circuit addressed *Hope* and held that:

> Subsequent to the grant of summary judgment, the Supreme Court in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), stated, "This rigid gloss on the qualified immunity standard though supported by Eleventh Circuit precedent is not consistent with our cases." Spring

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[2] This Court identified the errant Eleventh Circuit cases as being *Suissa v. Fulton County*, 74 F3d 266 (11th Cir.1996); *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F3d 1146 (11th Cir.1994); and *Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994).

> contends that had the district court used the appropriate standard for reviewing the claims of qualified immunity, it would not have granted summary judgment. . . . After considering the record and briefs, it is clear the district court utilized an incorrect legal standard in granting summary judgment based on qualified immunity. Therefore, we reverse and remand to the district court to reexamine the issue of qualified immunity if defendants wish to assert it in light of *Hope v. Pelzer*.

The *Spring* decision was rendered on June 13, 2003, about two months before the Eleventh Circuit decided the instant case on August 14, 2003. No individual judge served on both panels. (Appendix A, p. 1a; Appendix D, p. 15a.

While there has not been a prior case in the Eleventh Circuit with exactly the same set of freedom of association facts as the instant case, this Court has said, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful . . ., but it is to say that in the light of pre-existing law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Joey Adair submits that in the light of pre-existing law, the Defendants knew or should have known that it was unlawful to refuse to rehire Joey Adair because she was daughter of Brenda Adair. If *any* level of relationship is protected by the First Amendment, officials should certainly know that the mother-daughter relationship was clearly within the ambit of *any* such protection. Even if precedential case law was not persuasive, any "reasonable state official must have known" that you cannot deny a benefit to a person because he or she was the offspring of his or her own mother. (Appendix A, p. 7a).

Finally, there is also concern that public officials and others who must rely upon precedential cases in the conduct of their affairs are left in a state of uncertainty when important decisions that should be guiding their actions are in effect concealed from them in the form of unpublished opinions.

The current pervasive practice in the Eleventh Circuit of withholding publication of important decisions, in cases such as those involved here, only leads to unnecessary and unrealistic confusion. If this court used this case to clarify qualified immunity standards as they relate to familial relationships, a giant step in this field could be taken.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant this petition for rehearing and issue its Writ of Certiorari to the United States Court of Appeals requiring it to review its decision, reverse the judgments of the district court, and remand the case to that court for further proceedings.

Respectfully submitted,

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* Counsel of Record

Attorney for Petitioners

CERTIFICATION OF COUNSEL

Counsel herein certifies that this Petition for Rehearing is hereby submitted pursuant to Supreme Court Rule 44(2), in that it is restricted to substantial grounds not previously presented and that the Petition is presented in good faith and not for delay. Specifically, the Eleventh Circuit's unpublished decision of August 14, 2003 in this case (Appendix A, p. 5a) only acknowledged the case of *Hope v. Pelzer*, 536 U.S.730 (2002) which had been decided on June 27, 2002. However, a separate panel of the Eleventh Circuit decided another unpublished opinion in *Spring v. Shelton State Community College*, No. 02-14147, dated June 13, 2003 (Appendix D, p. 15a). Both unpublished decisions dealt with the standard to be applied in assessing the qualified immunity defense.

Respectfully submitted,

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APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 14, 2003]

No. 02-15750
Non-Argument Calendar

D.C. Docket No. 00-01562-CV-D-N

BRENDA ADAIR, JOEY ADAIR,
Plaintiffs-Appellants,

versus

ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS, STEPHEN C. WALKLEY, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before TJOFLAT, BIRCH, and MARCUS, *Circuit Judges.*

PER CURIAM:

Appellants Brenda and Joey Adair appeal from several rulings by the district court in favor of appellees, Alabama Department of Economic and Community Affairs ("ADECA"), Ann Payne as Director of ADECA, and Stephen Walkley, Raymond Clenney, and James Littleton in their individual capacities. Brenda Adair appeals from the district court's order dismissing her claims against the individual defendants, brought pursuant to 42 U.S.C. § 1983, on the ba-

sis of qualified immunity. She also appeals from the district court's order granting judgment as a matter of law to the appellees with respect to her claims brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Joey Adair appeals from the district court's dismissal of her § 1983 claims against Walkley and Littleton on the basis of qualified immunity.

"We review *de novo* a district court's entry of judgment on the pleadings, accepting the facts in the complaint as true and viewing them in the light most favorable to the nonmoving part." *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). We also review the district court's grant of judgment as a matter of law *de novo*, employing the same standard as the district court used and viewing all the evidence in the light most favorable to the nonmoving party. *See Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1313 (11th Cir. 1998).

Upon thorough review of the record as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The facts of this case are straightforward. Brenda Adair, an employee of ADECA, filed an EEOC charge and lawsuit against her employer in 1990, which she then settled in 1991. In 1998, Adair successfully requested a transfer to the Welfare-To-Work ("WTW") department of ADECA's Workforce Development Division ("WDW"). Unfortunately, Adair soon became frustrated with the WTW department because the State of Alabama was not funding the program.

Shortly thereafter, Stephen Walkley became the director of the WDW and began to reorganize the department. He assigned Brenda Adair to the State Planning and Rapid Response Section, one of the sections she had requested, where her new supervisor was Ray Clenney. Soon after the reorganization, Adair requested another transfer because she realized that she was now forced to work with Steve Davis,

one of the people against whom she had filed claims in 1990. To defuse any conflict, Director Walkley sent Adair a memo clarifying that Davis was not her supervisor and she would never have to work under him. Walkley told her that she should notify her actual supervisor, Clenney, if at any time she thought she was being subjected to a hostile work environment.

Beginning in October of 1999, Adair spent most of her time out of the office on sick leave for sinus surgery and herniated disc surgery. On July 27, 2000, she filed a notice of retirement. Soon after retiring, she filed a new EEOC charge. Adair claims that after the reorganization, her performance reviews dropped from 38.53 and higher ("Consistently Exceeds Standards") to 28.3 ("Exceeds Standards"). She also claims that she was denied training, was criticized verbally, and no longer had an employee working under her as before.

Meanwhile, Brenda's daughter Joey Adair, who had previously worked at ADECA, had taken a temporary leave of absence and now wished to return to ADECA. However, when she applied for re-employment, she was denied because of ADECA's problems with her mother. Brenda and Joey Adair then filed suit in federal district court on November 9, 2000, alleging seven separate claims against ADECA and the individual defendants.[1]

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[1] More specifically, the Adairs brought the following claims (all of which were brought by Brenda Adair except for claim 6, which was brought by Joey Adair): 1) a sex discrimination claim against ADECA pursuant to Title VII; (2) a retaliation claim against ADECA pursuant to Title VII; (3) a gender discrimination claim against ADECA, pursuant to the Equal Pay Act, 29 U.S.C. § 206(d)(1); (4) a claim for injunctive relief against the director of ADECA and for damages against Walkley and Littleton in their individual capacities, for violating her rights under the Equal Protection Clause; (5) a First Amendment retaliation claim against Walkley and Clenney in their individual capacities and for injunctive relief against the director of ADECA; (6) a First Amendment

The district court dismissed Brenda Adair's suit against the individual defendants, finding that they were entitled to qualified immunity. Then, after a three day jury trial, the district court granted judgment as a matter of law in favor of ADECA on Adair's Title VII hostile work environment, constructive discharge, and retaliation claims. In a special interrogatory, the jury returned a verdict in favor of Joey Adair on her remaining claim for injunctive relief against ADECA for its refusal to re-employ her. (The district court had previously granted qualified immunity to Walkley and Littleton on Adair's § 1983 claim). Following the district court's rulings, the Adairs appealed.

Brenda Adair argues on appeal that the district court erroneously held that none of ADECA's decisions constituted "adverse job actions." To prove an adverse employment action under Title VII, an employee must show a serious and material change in the terms, conditions, or privileges of her employment. *See Davis v. Town Lake Park, Fla.*, 245 F.3d 1232, 1238-39 (11th Cir. 2001). Furthermore, the change is to be judged by an objective standard. *See Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448-49 (11th Cir. 1998). Here, where the most serious change in the conditions of employment alleged by Brenda Adair is that her evaluations declined from "consistently exceeds standards" to "exceeds standards," we agree with the district court that she has failed to show that she suffered from an objectively adverse employment action.

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retaliation claim by Joey Adair for damages against Walkley and Littleton in their individual capacities and for injunctive relief against the director of ADECA; and (7) a retaliation claim for injunctive relief against ADECA under the Family Medical Leave Act, 29 U.S.C. § 2617. (During trial, Brenda Adair withdrew her claims under the Equal Pay Act and Family Medical Leave Act. In addition, Dorothy McKinney was a defendant in the original complaint but was removed from the case at an early stage in the proceedings).

Adair's sole response in her brief is that although the last fifteen years of our jurisprudence may indicate that she has failed to show an adverse employment action, we are actually bound by a prior panel decision in *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), in which we held that "Title VII gives us no license to decide that any injury, however insignificant, may be regarded as *de minimis*." *Id.* at 1561. However, *Cox* was a disparate treatment case in which a pattern and practice of discrimination had already been shown. The language quoted refers to an entirely distinct legal issue from the minimum showing a plaintiff must make to prevail on a retaliation claim under Title VII. *See Davis* 245 F.3d at 1239. Therefore, Adair is incorrect that the legal issue in this case has already been decided by *Cox*.[2]

Joey Adair appeals the district court's grant of qualified immunity to Walkley and Littleton. We use a two part test to determine whether state officials are entitled to qualified immunity. First, we determine whether the plaintiff's allegations, if true, establish a constitutional violation. *See Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 2513, 153 L.

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[2] In her brief, Adair also devotes two paragraphs to the district court's dismissal of her First Amendment claim. She argues that her claim was valid under the Supreme Court's ruling in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), which held that a state cannot refuse employment on the basis of an applicant's constitutionally protected free speech. *Id.* at 597, 92 S. Ct. at 2699. However, the district court dismissed Adair's claim because it found that her isolated and vague allegations about "having voiced allegations about the misuse of federal funds" "having filed [an] EEOC charge" and made "other protected utterances" were plainly insufficient to support a claim that the individual defendants knowingly retaliated against her for her protected exercise of public speech. We agree. *Perry* provides a legal framework for a First Amendment violation claim, but Adair must first plead a concrete set of facts to support it. *See generally GJR Inves. v. County of Escambia*, 132 F.3d 1359, 1367-68 (11th Cir. 1998) (establishing a "heightened" pleading requirement for litigants attempting to overcome a qualified immunity defense).

Ed. 2d 666 (2002). Second, if the plaintiff's version of the facts establish a constitutional violation, we determine whether the law was clearly established at the time. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001).

We therefore begin by determining whether the refusal to hire Joey Adair because of her relationship to her mother, if true, violates Joey Adair's constitutional rights. The Supreme Court has repeatedly held that a state may not deny employment to a person on a basis that infringes on her constitutionally protected interests, particularly freedom of association. *See, e.g., Perry*, 408 U.S. at 597, 92 S. Ct. at 2697. We have noted that "[t]he courts have strongly held that freedom of association is no longer tied merely to an advancing of political beliefs." *Wilson v. Taylor*, 733 F.2d 1539, 1543 (11th Cir. 1984).

In *Wilson*, a police officer had been terminated from the Winter Park, Florida police department for dating the daughter of an organized crime figure in Winter Park. We found that "[t]he concept of freedom of association has grown to include more than associations which are for the purpose of advancing shared beliefs." *Id.* As such, the relationship between the police officer and the crime figure's daughter was protected by the First Amendment, whose protections, we held, extended to "purely social and personal associations." *Id.* at 1544.

Assuming that the relationship between Brenda and Joey Adair is equally worthy of protection, and even accepting for the purposes of this case that Joey Adair has therefore proven a constitutional violation, we nevertheless conclude that Adair plainly fails the second prong of qualified immunity analysis—showing that the right was clearly established. In making this determination, we look to whether state officials were given "fair warning" that their conduct was unconstitutional. *See Hope*, 536 U.S. at 739-40, 122 S.

Ct. at 2515. We have held that a state official will be found to have had fair warning under two circumstances: (1) where a materially similar case has already determined that the conduct was illegal; or (2) where the conduct was so egregious that any reasonable state official must have known it was unconstitutional. *See Lee v. Ferraro*, 284 F.3d 1188, 1198-99 (11th Cir. 2002); *Rowe v. City of Ft. Lauderdale*, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002). Adair's counsel conceded to the district court that there is no materially similar case on point. Furthermore, we do not think that the supervisory defendants' refusal to rehire Joey Adair because of the litigiousness of her mother so obviously violated the First Amendment on its face that any reasonable state official would have known it at the time. Accordingly, we affirm the district court's grant of qualified immunity to Walkley and Littleton with respect to Joey Adair's First Amendment claims.

AFFIRMED.[3]

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[3] Appellant's motion to stay the decision on appeal pending a decision in *Bylsma, et. al., v. Walkley, et. al.*, 01-16102, is DENIED as moot.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

[Filed March 22, 2004]

William K. Suter
Clerk of the Court
(202) 479-3011

Mr. Alvin T. Prestwood
350 Adams Avenue
Post Office Box 1910
Montgomery, AL 36102-1910

No. 03-1047

Re: Brenda Adair and Joey Adair
v. Alabama Department of Economic and Community Affairs, *et al.*

Dear Mr. Prestwood:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
WILLIAM K. SUTER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

[Filed Dec. 30, 2003]

Civil Action Number 00-C-1316-W

DR. TED D. SPRING,

Plaintiff,

VS.

DR. TOM E. UMPHREY,

Defendant.

QUALIFIED IMMUNITY MEMORANDUM
OPINION ON REMAND

Plaintiff Dr. Ted S. Spring brought this action in 2000, alleging that be was subjected to retaliation and ultimately discharged in violation of is free speech rights under the First Amendment to the United States Constitution. The Defendant asserts that the case is barred by the doctrine of qualified immunity, which shields state actors from liability from constitutionally impermissible conduct if such conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818; 102 S. Ct. 2727 (1982). On remand from the Eleventh Circuit Court of Appeals, this opinion addresses that defense to liability.

I.

Spring worked as Vice-President of Shelton State Community College in Tuscaloosa, Alabama from 1992 until he was discharged in 1999 by the President of that institution,

Dr. Tom E. Umphrey. In his capacity as Vice-President, Spring was in charge of the day-to-day operations of Shelton State.

Several years into his tenure, Spring discovered academic fraud (e.g,, credits given for courses not taken), scholarship fraud (e.g., scholarships awarded to children of the President who were ineligible for such scholarships) and what he considered to be additional fraudulent, illegal, and unethical conduct by Umphrey and other Shelton State officials, Spring also became aware that Umphrey knew that Spring's name had been forged on three memoranda authorizing the questionable transfer of funds which were the subject of a federal grand jury investigation.

When Spring questioned Umphrey about the misconduct, Umphrey's response was to remove many of Spring's responsibilities and to transfer him from Shelton State's main campus to a phoneless office without air-conditioning on a satellite campus.

In 1995, Spring testified before the federal grand jury investigating Shelton State and Umphrey.

In October 1998, Spring wrote to Fred Gainous, the Chancellor of PostSecondary Education for the Alabama State Department of Education, and outlined his allegations of fraud and other irregularities by Umphrey and other Shelton State officials. He later met with Gainous and discussed these concerns.

In March 1999, the Southern Association of Colleges and Schools ("SAC") visited Shelton State to conduct an on-site review for the re-accreditation of the college. It was a part of Vice-President Spring's responsibilities to meet with the SAC officials, However, to prevent Spring from meeting with the SAC team, Umphrey directed Spring to perform out-of-town

duties while the SAC was visiting the campus. Nevertheless, Spring met with the SAC team and disclosed the perceived irregularities in the operation of the college.

A few months later, on Umphrey's recommendation, Spring was discharged. Umphrey has stipulated that Spring's communications with Gainous and the SAC team played a substantial role in his decision to discharge Spring.

II.

Based on these largely undisputed facts, this Court in April 2002 found that 1) Spring's speech involved matters of public concern, 2) the interests of Spring, as a citizen, in commenting on these matters of public concern, outweigh the interests of Shelton State, as an employer, in promoting the efficiency of the public services it performs through it employees, and 3) Spring's speech played a substantial role in Umphrey's decision to discharge him.

But relying on *Chesser v. Sparks*, 248 F.3d 1117, 1122-1125 (11th Cir.2000); *Stanley v. City of Dalton*, 219 F.3d 1280, 1294-1298 (11th Cir.2000) and *Dennis v. School Board of Volusia County, Florida*, 218 F.3d 1267 (11th Cir.2000), the Court held that Spring's claims against Umphrey were barred by the doctrine of qualified immunity, since there was no Supreme Court or Eleventh Circuit case clearly establishing the First Amendment right not to be terminated in a "concrete and factually defined context" substantially similar to those in this case. *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir.1994); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir.1993).

Spring's counsel wisely pursued appeal of this Court's initial dismissal of the case.

While the appeal was pending, the United States Supreme Court decided that the Eleventh Circuit teachings in the qualified immunity context were erroneous. *See Hope v.*

Pelzer, 536 U.S. 730, 122; S.Ct. 2508 (2002). The Court reminded the Circuit that for purposes of qualified immunity, even in novel circumstances, officials can still be on notice that their conduct violates established law, as notice does not require that the facts of prior cases be materially or fundamentally similar to the facts in the case at bar. Rather, the pivotal question is whether the state of the law at the time of the challenged action gave fair warning to the state actors that their conduct is unconstitutional. *Id.*, U.S. at 740, 741; S.Ct. at 2516. The Supreme Court found that the Eleventh Circuit's "rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with [Supreme Court] Cases." *Id.*, U.S. at 739; S.Ct. at 2515.

In light of *Pelzer*, the Eleventh Circuit has reversed this Court's qualified immunity dismissal, and remanded the case for re-examination of the qualified immunity defense.

This court welcomes that opportunity.

III.

The Court finds and concludes, without considerable difficulty, that when Umphrey made and implemented his decisions to retaliate against Spring in the 1996-1999 period and to discharge him in 1999 because of his exercise of his right to speak on matters of public concern, Umphrey was on fair notice that his conduct violated clearly established First Amendment law.

The earliest case which imparted such notice to the Defendant was the landmark case of *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), which stands for the general proposition that public employees may not be dismissed for speech on matters of public concern if their free speech rights as an employee outweigh the public employer's legitimate interests in promoting the efficiency of the services it provides.

D'Andrea v. Adams, 626 F.2d 469 (5th Cir.1980) gave notice to Umphrey that the First Amendment protects a university professor's statements to a legislative budget subcommittee concerning perceived improprieties in the use of the university's funds, even if the statements are inaccurate. Like Umphrey, the defendant in *D'Andrea* was the president of an Alabama state university.

Kurtz v. Vickery, 855 F.2d 723 (11th Cir.1988), another case involving an Alabama state university, gave notice to Umphrey that the First Amendment protects a university professor's criticisms of the university president and the university's expenditure of funds.

The case of *Martinez v. City of Opa-Locka, Florida*, 971 F.2d 708 (11th Cir.1992), gave fair warning to Umphrey not only that the First Amendment protects a public employee from discharge in retaliation for testimony that the city's bid procedures had been violated by the City Manager, but it also warned him that the doctrine of qualified immunity does not shield such conduct. *Id.*, at 713.

All the other relevant authorities gave fair notice to Umphrey that the First Amendment protects Spring's utterances to the Chancellor of PostSecondary Education and the SAC. *See, Little v. City of North Miami*, 805 F.2d 962 (11th Cir.1986); *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987); *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir.1989); *Oladeinde v. City Birmingham*, 963 F.2d 1481, 1486-87 (11th Cir.1992); *Belyeu v. Coosa County Bd. of Ed.*, 998 F.2d 925 (11th Cir.1993); *Beckwith v. City of Daytona Beach, Florida*, 58 F.3d 1554, 1563 (11th Cir.1995) ("We hold that state employees retain a federal cause of action under the First Amendment when they allege that government employment decisions were taken in an attempt to chill expression protected by the First Amendment"); *Fikes v. City of Daphne*, 79 F.3d 1079, 1083 (11th Cir.1996) ("It is

well established that a state may not discharge a public employee in retaliation for public speech").

Conclusion

In light of the clearly established law on Spring's right of free speech in the circumstances of this case, Umphrey's defense of qualified immunity cannot prevail.

It is therefore DECLARED that the doctrine of qualified immunity does not shield Defendant's First Amendment violation in this case.

Done this 30th day of December, 2003.

/s/ U. W. Clemon
U. W. CLEMON
Chief United States District Judge

APPENDIX D

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed June 13, 2003]

No. 02-14147
Non-Argument Calendar

D.C. Docket No. 00-01316-CV-C-W

DR. TED D. SPRING,
Plaintiff-Counter-Defendant-Appellant,

versus

SHELTON STATE COMMUNITY COLLEGE,
Defendant-Counter-Claimant-Appellee,

ALABAMA DEPARTMENT OF POSTSECONDARY EDUCATION, FRED GAINOUS, TOM E. UMPHREY, individually and officially,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before ANDERSON and BLACK, *Circuit Judges*, and SHAPIRO*, *District Judge*.

PER CURIAM:

Plaintiff, Dr. Ted D Spring, Vice President of Shelton State Community College ("Shelton State"), appeals the district

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* Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

court's grant of summary judgment, and denial of his motion to reconsider the judgment in favor of defendants, Fred Gainous, Chancellor, and Tom E. Umphrey, President of Shelton State, in their individual capacities, on the ground of qualified immunity.

On July 11, 2000, Dr. Spring filed an amended complaint against Shelton State, the Alabama Department of Post-Secondary Education, Fred Gainous, Chancellor of Post Secondary Education, and Tom Umphrey, President of Shelton State, in both their official and individual capacities. Dr. Spring alleged the defendants retaliated against him in violation of the First Amendment, Equal Protection Clause of the United States Constitution, and 31 U.S.C. § 3730(h) for investigating and speaking out as Vice President regarding illegal, fraudulent, and unethical conduct at Shelton State; he also asserted pendent state law claims.

On July 16, 2001, defendants filed a motion for summary judgment in which they asserted the defense of sovereign immunity because Gainous and the Alabama Department of Post-Secondary Education had no lawful authority to terminate Spring. Defendants also contended plaintiffs First Amendment claim did not involve speech related to a matter of public concern.

The district court granted defendants' motion for summary judgment in favor of Shelton State, Gainous and Umphrey, in their official capacities, and the Alabama Department of Post Secondary Education on the ground of absolute immunity from damages under the Eleventh Amendment. Gainous and Umphrey were also found entitled to qualified immunity from liability in their individual capacities for violation of plaintiff's First Amendment rights under 42 U.S.C. § 1983 although defendants failed to raise the defense in their motion for summary judgment. The district court later denied plaintiff's motion to reconsider.

Dr. Spring timely appeals the district court grant of qualified immunity to Gainous and Umphrey in their individual capacities. He argues qualified immunity was not asserted by the defendants, and that the legal standard used by the district court has been modified by *Hope v. Pelzer*, 536 U.S. 730 (2002).

I. FACTUAL BACKGROUND

Dr. Spring served as Vice President of Shelton State from September, 1992, until his termination in June 1999. Defendant, Fred Gainous, Chancellor of the Alabama Department of Post Secondary Education, and Tom Umphrey, President of Shelton State, interviewed and hired Dr. Spring.

In the course of his employment, Spring became convinced of illegal, fraudulent and unethical conduct by Umphrey and other Shelton State employees. He also became aware that Umphrey knew Spring's name had been forged on three memoranda authorizing the transfer of funds to a program the subject of a federal Grand Jury investigation.

When Spring questioned Umphrey about the misconduct, Umphrey took no action to stop or correct it but instead took away some of Spring's responsibilities. Spring then met with Gainous to report illegal conduct regarding academic scholarship[1] and credit card fraud, and the retaliation against Spring. Despite Gainous's promise to investigate the allegations and respond, he never contacted Spring or took any corrective action.

Spring contends Umphrey continued to retaliate by taking important duties and responsibilities from him. Spring wrote Gainous again but neither Gainous nor his office responded. Spring was ordered off-campus during the Southern Association of Colleges and Schools ("SACS") accreditation visit,

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[1] It is alleged that President Umphrey's son, Tom Jr., illegally received scholarship funds as did his daughter, Libby.

but he informed SACS of illegal and fraudulent conduct in the Spring of 1999, and the retaliatory conduct by Umphrey intensified.

Spring had never been reprimanded for any substandard performance until he began to complain of illegal, unethical, and fraudulent practices. In June, 1999, defendants terminated Spring on charges of negligence, incompetence, and insubordination.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo* and apply the same legal standards used by the district court. The evidence and all factual inferences are viewed in the light most favorable to the party opposing the motion and all reasonable doubts about the facts are resolved in favor of the non-movant. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1271 (11th Cir. 2001).

III. DISCUSSION

Finding Spring's speech related to a matter of public concern, his interest in engaging in the speech outweighed defendants' interest in prohibiting it, the speech played a substantial role in the decision to terminate Spring, and that defendants would not have made the same decision in the absence of the protected speech, the district court concluded that Spring's First Amendment right to free speech had been violated by his termination for voicing concerns about academic fraud, scholarship fraud, and other improprieties at Shelton State. But the district court then found Gainous and Umphrey entitled to qualified immunity because there was no Eleventh Circuit or U.S. Supreme Court case clearly establishing the right not to be terminated in a "correct and

factually defined context" substantially similar to this case (R1-27; R1-28).

Subsequent to the grant of summary judgment, the Supreme Court, in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), stated, "This rigid gloss on the qualified immunity standard though supported by Eleventh Circuit precedent is not consistent with our cases." Spring contends that had the district court used the appropriate standard for reviewing the claims of qualified immunity, it would not have granted summary judgment. Spring also claims the district court erred by granting summary judgment on the basis of qualified immunity when defendants failed to move for summary judgment or present any argument on this issue below.

After considering the record and briefs, it is clear the district court utilized an incorrect legal standard in granting summary judgment based on qualified immunity. Therefore, we reverse and remand to the district court to reexamine the issue of qualified immunity if defendants wish to assert it in light of *Hope v. Pelzer*. This disposition renders moot whether qualified immunity was previously raised in the district court.

REVERSED and REMANDED.